



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H. 19, as amended;

AND IN THE MATTER OF the complaint by Michael McKinnon alleging reprisal, discrimination in employment on the basis of race, ancestry, ethnic origin and harassment by Her Majesty the Queen in Right of Ontario (Ministry of Correctional Services), Frank Geswaldo, George Simpson, Phil James and Jim Hume.

BETWEEN:

Ontario Human Rights Commission

- and -

Michael McKinnon

Complainant

- and -

Her Majesty the Queen in Right of Ontario (Ministry of Correctional Services), Frank Geswaldo, George Simpson, P. James and Jim Hume.

Respondents

DECISION

Adjudicator : H. Albert Hubbard

Dates : April 28, 1998

Board File No: BI-0115-92 and BI-0033-95

Decision No. : 98-010

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946
TTY: (416) 314-2379 / 1-800-424-1168



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H. 19, as amended;

AND IN THE MATTER OF the complaint by Michael McKinnon alleging reprisal, discrimination in employment on the basis of race, ancestry, ethnic origin and harassment by Her Majesty the Queen in Right of Ontario (Ministry of Correctional Services), Frank Geswaldo, George Simpson, Phil James and Jim Hume.

BETWEEN:

Ontario Human Rights Commission

- and -

Michael McKinnon

Complainant

- and -

Her Majesty the Queen in Right of Ontario (Ministry of Correctional Services), Frank Geswaldo, George Simpson, P. James and Jim Hume.

Respondents

DECISION

Adjudicator : H. Albert Hubbard

Dates : April 28, 1998

Board File No: BI-0115-92 and BI-0033-95

Decision No. : 98-010

Board of Inquiry (*Human Rights Code*)
150 Eglinton Avenue East
5th Floor, Toronto ON M4P 1E8
Phone (416) 314-0004 Fax: (416) 314-8743 Toll free 1-800-668-3946
TTY: (416) 314-2379 / 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission	)	
	)	Paul Martial, Counsel
	)	
Michael McKinnon, Complainant	)	
	)	David Wright, Counsel
	)	
Respondents:	)	
Ministry of Correctional Services	)	
Frank Geswaldo	)	
George Simpson	)	Dennis Brown, Counsel
Phil James	)	John Zarudny
Jim Hume	)	Michael Fleishman

PART I - INTRODUCTION	2
PART II - EXPOSITION AND ANALYSIS OF THE EVIDENCE	3
1. General Matters	3
2. Appropriate Forum	5
3. The First Complaint and its Setting: racial slurs	6
4. The Second Complaint	65
5. Relevant "Third-Complaint" Circumstances	102
6. Similar Fact Evidence and Other Relevant Post-Complaint Circumstances	127
PART III - LIABILITIES	149
1. Liability for poisonous atmosphere	149
2. Liability of the Ministry of Correctional Services	151
3. Liability of Frank Geswaldo	154
4. Liability of Phil James	156
5. Liability of Jim Hume	158
6. Liability of George Simpson	160
7. Liability in respect of the OM14 Competition	161
PART IV - THE MATTER OF REMEDIES	163
1. General	163
2. Special Damages and Related Matters	167
3. Other Remedies Sought	173
PART V - ORDERS	174



Digitized by the Internet Archive
in 2014

https://archive.org/details/boi98_010

PART I - INTRODUCTION

In his complaint of November 29, 1988, Mr. McKinnon (the Complainant), a person of native Canadian ancestry, alleges that his right to equal treatment in employment without discrimination, and his right to be free from harassment in the workplace, because of race, ancestry and ethnic origin, in contravention of (what are now) s.5(1) and (2) and s.9 of the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the "*Code*"), were infringed by the Ministry of Correctional Services (the "Ministry"), and by Messrs Frank Geswaldo, George Simpson and Jim Hume. Mr. McKinnon's complaint of June 28, 1990, alleges that, in contravention of (what are now) s.8 and s.9 of the *Code*, these same Respondents together with the Respondent Phil James, infringed his right to be free from actual or threatened reprisal for having claimed and sought to enforce his rights under the *Code*.

The relevant provisions of the *Code* are as follows:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, ... ethnic origin ...
(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or by another employee because of race, ancestry, ... ethnic origin...
8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act ... without reprisal or threat of reprisal for so doing.
9. No person shall infringe or do directly or indirectly, anything that infringes a right under this Part.
10. (1) In Part I and in this Part,

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.
41. (1) Where the board of inquiry, after a hearing, finds that a right of the Complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

45. (1) For the purpose of this Act, except subsection 2(2), subsection 4(2), subsection (2), section 7 and subsection 44 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association or employers' organization.

Although the Complainant filed a third complaint against these Respondents on April 2, 1992, the question of liability in relation to it was not before me because the Ontario Human Rights Commission (the Commission) decided not to request the appointment of a Board of Inquiry to hear that complaint. However, while that issue is confined to the allegations made in the first two complaints, in view of the nature of the remedies sought by the Commission and the Complainant, for the reasons set out in my interim decision of April 9, 1996, evidence was admitted regarding circumstances and events alleged to have occurred after June 28, 1990, involving racial discrimination and harassment affecting the environment, or atmosphere, of the Complainant's workplace, known as the Metropolitan Toronto East Detention Centre (the Centre).

The hearing of these complaints took place in Toronto over a period of forty-five days, commencing February 7, 1996 and ending October 21, 1997, and the record of these proceedings (for which there is no transcript) consists of scores of audio cassettes or tapes, the clarity of many of which leaves much to be desired, together with 246 exhibits.

While there is some disagreement as to the range of remedies this Board is empowered by the *Code* to order, there is no dispute between the parties as to the law regarding the issue of liability, which, in this case, turns entirely on the credibility of the witnesses and the inferences to be drawn from their testimony.

PART II - EXPOSITION AND ANALYSIS OF THE EVIDENCE

1. General Matters

The Complainant began his career as a corrections officer with the Ministry in December of 1977 at the Centre, and it is there that all the events involved in these complaints are alleged to have occurred and where, except for a brief interruption, he has been continuously employed ever since. Annual and special assignment "Performance and Review Report" appraisals covering this entire period were not placed before me, but those that were made part of the record by the Complainant (Exhibits 4 to 9, inclusively) were clearly positive, ranking him on a numerical scale as a "very good" to "excellent" corrections officer in every category of assessment. While over the course of this long span of employment he was the subject of occasional managerial criticism (the validity of which is at issue), there is nothing to suggest that the Complainant's general performance record is less than commendable. Despite ready access to the records, the Respondents did not provide any performance appraisal reports suggesting anything to the contrary, and it was the consistent evidence of virtually all the witnesses that the Complainant was dedicated, conscientious and meticulous in his work.

Subject to some gaps, the period covered by these exhibits runs from January 1, 1984 to December 31, 1991, and it should be noted that one of these appraisals contains a marginally negative observation. Although indicating that his rating in respect of "working relationships with fellow officers and supervisors" ranged from "satisfactory" through "commendable" to "exceptional", Exhibit 1 also notes that the Complainant "on occasion encounters some difficulty when dealing with some supervisors". The Complainant's explanation was that he found some of the supervisors to be complacent and defensive about safety issues when questioned by him in that regard. Indeed, his pre-occupation with such issues was made clear by his own testimony and that of everyone else whose evidence addressed that aspect of the matter.

The interruption in the Complainant's employment with the Ministry to which reference has been made was occasioned by an incident in 1982 involving a fight amongst prisoners in a section of the Centre known as the 5C unit. The staff members who responded to this apparently drug-

related altercation physically separated the two main combatants and, as an apparent consequence of their intervention, one of these prisoners suffered a cheek injury. This led to the suspension of six officers who were alleged to have used excessive force. The other prisoner involved in the incident was found dead in a cell a few weeks later. Although subsequently dismissed for allegedly interfering with the investigation into this incident, following a grievance hearing the Complainant and three other officers were later re-instated with a three month suspension.

One of two general submissions made by the Respondents at the outset of their argument was that the Complainant harboured a festering bitterness over this 1982 incident which fuelled his many grievances and led ultimately to the filing of his complaints with the Commission. The other was the suggestion that the matters before me had to do with labour relations rather than human rights. Neither of these submissions appears to advance the Respondents' position, and it is convenient to dispose of them before dealing with the evidence relating to the specific events primarily in question here.

In my view, not only is the suggestion that the Complainant's complaints were spawned by the 1982 incident pure conjecture of an improbable character, but it is virtually irrelevant. While two of the Respondents' witnesses so surmised (Messrs Dvorak and Windebank), they offered no concrete evidence to support that supposition. A few other witnesses called by them indicated that they found the Complainant had changed following this incident, but they did not even try to link this perceived change with the pursuit of his human rights complaints. Moreover, the Complainant's denial that the incident had anything to do with his complaints is far more plausible since none of the individual Respondents had acted in any adverse manner towards him regarding that incident so as to trigger such a reaction. Indeed, Mr. Hume was not yet at the Centre, and Messrs Geswaldo and James were simply uninvolved co-workers of no higher rank at the time. Be that as it may, if the Complainant's allegations are true they provide ample motivation and, indeed, justification, for the laying of his complaints; and if they are untrue the suggestion that he acted out of revenge, or was driven by some sub-conscious resentment over that incident to go to the Commission some six years later with groundless complaints, is entirely unnecessary to the Respondents' case and, in any event, lacks probative value.

2. Appropriate Forum

Other than to imply that it should somehow affect the outcome of this hearing, the purpose of the submission that the matters before this Board are at bottom issues of labour relations, rather than of human rights, is not entirely clear; but it does seem to suggest that the parties are in the wrong forum. Certainly, much of the testimony in these proceedings had to do with matters of mutual concern to the employer and its employees and were no doubt labour relations matters that could be dealt with in some other forum, or by some other process. The Complainant has been a vocal and active member of *OPSEU* throughout his career, serving at times as a steward and vice-president of the union local. Many of the grievances in which he was involved before filing his first human rights complaint had to do with issues of health and safety, and often he was acting as a union representative. It was not until the time of that complaint that many of the occurrence reports and grievances authored by him came to concern incidents of a personal nature relating to other kinds of issues. Moreover, it was pointed out by the Complainant, and went unchallenged by the Respondents, that prior to 1990 the collective agreement had no mechanism for dealing with discrimination *per se*. But even if all of the Complainant's complaints could have been addressed in some fashion without resort to proceedings under the *Code*, the availability of alternative processes does not necessarily deprive the Complainant of his right to choose his forum and to seek remedies he considers most appropriate to the perceived wrongs.

The Respondents did not suggest, either by way of demurrer at the outset, or in final argument, that even if the Complainant's allegations of fact are true they disclose no breaches of the *Code*, and if proof of those allegations would establish the infringement by the Respondents of any of the Complainant's rights under the *Code*, the fact that they might also be matters that could be dealt with alternatively, or concurrently, through various labour relations processes (as, indeed, some of them were) is entirely irrelevant. Not only is the Board of Inquiry under the *Code* an appropriate forum for dealing with these matters despite any coincidence or overlap with the jurisdiction of other tribunals, but it is the only forum in which the Commission, which has the carriage of the case, can seek to vindicate the overriding public interest in such matters.

If some narrower purpose was meant to be served by the assertion that the matters in dispute relate to labour relations and not to human rights, surely it could only have to do with the

submission that the Complainant was aggressive and abrasive, particularly when engaged in the activities of the union local, thereby incurring the wrath of management, and that it was this, rather than racism, that led to the friction that provoked the conduct of which he complains. However, that is a matter to be examined in the context of the specific allegations made in the complaints, and the general averment that this is really just a labour relations dispute does not relieve me of the necessity of dealing with them fully.

3. The First Complaint and its Setting: racial slurs

The first alleged incident of the use of unacceptable racially based language directed at him mentioned in his complaint of November 29, 1988, is described as follows in paragraphs 3 and 4 of that complaint:

3. About April 13, 1988, I was assigned to the 2:00 to 10:00 shift. At 4:45, I was talking with C.O. Don Stockwood after our detail work was completed. Cpl. Geswaldo returned and said he didn't believe us guys, and asked if this was a pow wow.
4. I asked why he would use the phrase "pow wow," and he asked if I was a fuckin Indian. I replied that I was not a fuckin Indian, but I was an Indian. He then started laughing and said he did not know that.

In the course of his evidence the Complainant corrected the date on which the circumstances in paragraphs 5 to 8 of this complaint are alleged to have occurred. According to his "log" (Exhibit 13) the date was May 26, 1988, and that date was confirmed by Mr. Hill's report regarding the matter (Exhibit 123). These paragraphs are as follows:

5. On April 13 [read May 26], 1988, as a result of the continuing harassment, I asked to speak with Acting Lt. Hill of senior management. Later that day, I informed him that I was lodging a complaint of harassment, including unwelcome racial slurs, against Corporal Geswaldo.
6. On the same day [*i.e.*, May 26], a meeting was set up by Lt. Hill and Lt. Meloche between myself and Cpl. Geswaldo. I told him that I wanted him to stop making comments about my ancestry and asked why he was centering on me out in front of other staff. He did not feel he was centering me out, and said he would not change his ways for anyone.

7. During this meeting, he asked if I were really a fuckin Indian. I told him that I did not want him to use those terms. I reminded him that he attended my wedding, and asked if he remembered the headdress. He said that he thought it was a fuckin joke. I believe that Cpl. Geswaldo understood my position. He said he thought I was too sensitive and that no one else complains about the way he talks to them.
8. As we walked down the hall after the meeting, Cpl. Geswaldo once again, asked me if I were really a fuckin Indian. I said, "Frank, doesn't anything sink in?"

Since it was one of the main focal points of the evidence and argument, and as the use of the expression "pow wow" might readily appear to be an innocent reference to a discussion between two persons, particularly if the speaker does not know that one of those to whom it is addressed is a person of native ancestry, it is important to set this incident in the full context of its surrounding circumstances: the general environment of the Complainant's workplace, the actions of the Respondents leading up to that incident, and whether they had knowledge of the Complainant's native ancestry when so acting.

There was evidence that in the period preceding the first complaint the Complainant was called or referred to in the workplace by a number of names the clear North American Indian connotations of which I am entitled to take judicial notice. While many of these names are, to say the least, unflattering, they were grouped together and came to be referred to euphemistically as "nicknames" by various witnesses. The nickname "Chief" would seem to have been the one most frequently used, and it was apparently first applied to the Complainant by Mr. Dunbar who preceded Mr. Simpson as superintendent.

While the word "Chief" is perfectly neutral in itself, it is clear that in some contexts it has a particular aboriginal connotation, signifying as it does the head or leader of an Indian band. In the Complainant's case, the nickname was used not only in the workplace but in relation to his participation as a member of the Centre's hockey team. By all accounts, he was regarded as a player of considerable talent, being one of the stars of the league and having been named "most valuable" player in one of its tournaments. The evidence shows that it was widely known in the institution that two famous native Canadian professional hockey players (Armstrong and Busek)

were called "Chief", and it is rather doubtful that those who chanted that nickname during the course of a game were using it any derogatory sense, regardless of the Complainant's distaste for it. By the same token, however, the use of that name in that context bespeaks knowledge of the Complainant's native ancestry, a knowledge that could not be set aside upon entering the workplace, and which belies the Respondents' assertions that they neither knew, nor suspected, the Complainant's heritage prior to the "pow wow" incident.

One of the witnesses, Michael Bunting, testified that during the period relevant to the first complaint he had heard the Complainant referred to variously as "Chief", "Wagon Burner", "McInjun", and "Geronimo", while his wife Vicki Shaw-McKinnon was sometimes referred to as Vicki *Squaw*-McKinnon. In answer to specific questions he said that he had heard Mr. Geswaldo refer to the Complainant as "Chief", as the "Wagon Burner", as "McInjun", and as the "Big Indian", and he also said that he had on occasion heard Mr Geswaldo and a co-worker named Tony Dipoce call each other a "wop", and apparently not always in jest. Mr. Bunting testified as well that he had heard Mr. James, whom he said "would call Chinese guys 'Chinks', black guys 'niggers', Italian guys 'wops' and Pakistanis 'Pakis'," refer to the Complainant as "McInjun" and "the Big Indian". Indeed, in April of 1989 the Complainant filed a report at the request of management regarding an allegation that Mr. James had called another officer a "Paki". He received a reply from Mr. Poynter suggesting that his report "included hearsay evidence that Mr. N. Bhasin told you Mr. P. James called him a 'packy' (*sic*)" and informing him that the writer had "met with both Mr. Bhasin and Mr. James and this matter has been resolved". (See Exhibit 34. Of course, regardless of its truth, Mr. Bhasin's assertion would not be hearsay.) Mr. Poynter's evidence regarding this document (May 21, 1997, Tape 5, Side A, at number 376 on the transcriber used to listen to it) was simply that he had "no substantial recollection of the circumstances of this incident other than this memo", the contents of which he merely repeated. Although the absence in that reply of any denial is not proof that the term had been used, one would expect that had the process of "resolving the matter" led to that conclusion then, for the sake of all concerned, it would have been stated in no uncertain terms – particularly since, by the time of this report, the Complainant appears to have been regarded by management as a troublemaker.

Under cross-examination by counsel for the Commission, Mr. Geswaldo named a number of persons he recalled having used the expressions "Chief", "Tomahawk" and "Running Bear" in reference to the Complainant. Mr. James, his fellow Respondent, was amongst those he named, along with Messrs Stevens, Minsky, Melville and Carter, and he said that there were certainly others whose names he could not recall.

Mr. Stan Beckta testified that he had heard the Complainant referred to as "Tomahawk" and as "a member of the F.B.I." (for "Fucking Big Indians", he explained), while Mr. Johnson said that he had heard him referred to as "Canoe", as well as "Chief" and "Wagon Burner", and Mr. Welsh said that he heard Mr. James making fun of an older aboriginal inmate by asking whether he was related to "Big Canoe".

Mr. Gallina said that he heard the Complainant referred to as "Chief" by staff members, lower managers and sergeants, and that the expression "pow wow" was used in relation to such things as the Complainant's "going home to have a 'pow wow' with his wife, Vicki" and his involvement with a provincial native group. When asked in cross-examination to whom, if anyone, he had reported hearing such things, Mr. Gallina (who is of mixed Italian and French descent) said that he had told the Complainant about it, and that sometime in 1995 he had drawn to the attention of Mr. DeFranco the use of those expressions and others, such as "wop" and "frog", that were frequently used in the institution.

The evidence of Anthony Weekes in this regard was that the Complainant was the butt of pictorial caricatures as well as name-calling. He testified that he had heard the Complainant referred to derogatorily in the officers' lounge as "Crazy Horse", and that amongst the racist cartoons he said were placed periodically on bulletin boards was one depicting an Indian in ceremonial headdress with the caption "Chief Crazy Horse McKinnon" written at the bottom, and which he indicated drew much laughter.

Finally, it is to be noted that Messrs Geswaldo, James, Johnson and Gallina mentioned a non-racial "nickname" that may be added to the list of epithets used in relation to the Complainant, namely, "Mr. Bitter".

The Respondents maintained that it was not they, but the Complainant, who indulged in racist name calling and commentary. Mr. Geswaldo accused the Complainant of calling him a "wop", a "stinking wop" and a "bald-headed wop", of calling Tony Dipoce a "wop" as well, and of calling Stan Parulski a "Polack" and referring to a co-worker named Rudy Cruz as a "fucking Filipino Dog Eater". The Complainant, of course, denied all of this. Although the Respondents did not call Mr. Dipoce as a witness, they called Mr. Cruz who testified that he could not recall the Complainant having ever called him a "Filipino dog eater", but that Mr. Geswaldo had done so, although he took no offence because people where he comes from do eat dogs and it was simply banter. Mr. Parulski testified initially that the Complainant had called him a "Polack", but under cross-examination admitted that, while many people called him that name, he had no specific recollection of the Complainant's having done so.

Mr. James similarly accused the Complainant of racist language. He testified that sometime around 1982, while they were looking out a window observing some black people emerging from a car in the parking lot, the Complainant asked rhetorically, "Where's Chernobyl when you need it?" Mr. James, who said he knew this occurred around 1982 because he was single when it happened, was quite taken aback when in the course of cross-examination it was pointed out to him that the Chernobyl nuclear reactor accident occurred in 1986. While Mr. James also alleged that the Complainant had called him a "half-baked Jamaican nigger", in cross-examination he was unable to place the alleged utterance of that offensive remark in any context of time, place or incident. While not self-destructively anachronistic as was the allegation regarding Chernobyl, I find no more believable the accusation, vigorously denied by the Complainant, that he had called Mr. James a "nigger", qualified or otherwise.

Exhibit 39 is a forty-nine page report of the *Independent Investigations Unit*, dated May 1, 1995. It was filed by the Complainant in illustration of the extent to which Messrs Geswaldo and James asserted his proclivity to racist behaviour. That report concerned a complaint made against the Complainant in 1992 by Vince Daley, a black member of the managerial staff, who had accused the Complainant of racial discrimination and harassment. Mr. Daley had himself been the subject of a complaint of sexual harassment regarding which he alleged that the Complainant, who had acted in the matter as a union representative, had "set him up" because of his race. Mr. Daley

alleged as well that the Complainant had indulged in racist conduct over a period of time, including having said while attending a wake in 1985: "Why [the deceased]? Why couldn't it have been some nigger?" It was established that the funeral in question occurred in 1982, and that none of the witnesses heard the Complainant make such a comment which, of course, the Complainant denied having made. The assertions of Messrs Geswaldo and James that the Complainant had called the one a "bald-headed wop" and the other a "half-baked nigger from Jamaica" having been presented to him as constituting similar fact evidence, the *I.I.U.* investigator reviewed the history of recent animosity between the Complainant, on the one side, and Mr. Vince Daley and the Respondents, on the other, and he concluded that not one of Mr. Daley's allegations had been substantiated. Although another black officer named Mark Daley testified before me on behalf of Mr. McKinnon, Mr. Vince Daley was not called as a witness in these proceedings.

Although it does not relate to the use of racist names, either by or about the Complainant, it is convenient to deal here with the suggestion that, in addition to being prone to make racist comments (which allegation I find unfounded), the Complainant is a belligerent individual whose aggressive behaviour has caused considerable problems in the Centre. Of course, even if that assertion were true it would not justify discrimination and harassment in contravention of the provisions of the *Code*, although it might be relevant in considering the matter of damages should the Respondents be found liable.

The only credible suggestion of unacceptable aggressive behaviour on his part brought to my attention had to do with an encounter the Complainant had in November of 1992 with the then Secretary to the Superintendent, Ms. Kelly Lehmkuhl. It is alleged that, when informed that a grievance hearing he was to attend as vice-president of the union local had to be postponed owing to the illness of Mr. Cooley, the Complainant demanded of Ms. Lehmkuhl (to quote from Exhibit 170, at page 9) "in a louder than normal tone of voice" that someone else hear the grievance instead, and that later that day "he came to her office and raised his voice in anger about the same situation".

Exhibit 170 is a labour relations tribunal decision regarding a series of grievances brought by the union in the course of which the McKinnon-Lehmkuhl confrontation was dealt with peripherally,

and regarding which the tribunal said (at page 23) that it "is very clear that Mr. McKinnon intimidated Ms. Lehmkuhl". There appears to have been no dispute as to the occurrence itself, but the Complainant still does not accept that characterization of his conduct. Although she did not witness the encounter, Ms. Doherty, whose Secretary she was, indicated that Ms. Lehmkuhl came to her in an agitated state which the Superintendent attributed to it. While nothing suggests that the Complainant was being untruthful as to the facts, I am not prepared to find that his behaviour was not inappropriate. However, one must take into account that the incident occurred at the end of 1992 at a time when (as will be seen in detail) he had already endured a great deal of stress because of the abuses to which he had been subjected for years. As this outburst, which was not directed at the individual Respondents, was the only instance of untoward conduct on his part that they established, it can hardly be taken to deflect their responsibility, and that of the Ministry, for breaches of the *Code*.

There was conflicting evidence before me as to the extent to which it was generally known in the institution that the Complainant was a person of native ancestry. In addition to three of the Respondents, twenty-eight witnesses were called on their behalf, eight of whom said they were unaware of the Complainant's native background. Of these, three said they had not heard any of the "nicknames" applied to the Complainant, two had heard only the name "Chief", one was at the Centre only briefly (1980-82), one (Mr. Poynter) arrived late in 1987, and one who had been at the Centre for nineteen years said that he learned of the Complainant's background "after a few years", which could be relatively early on. Another of the Respondents' witnesses said that, having heard rumours to that effect he inferred from the use of the name "Chief" that the Complainant was a person of native heritage. The rest of their witnesses were either not questioned in this regard, or arrived at the Centre after the first complaint, by which time the Respondents' knowledge of the matter is beyond dispute.

Mr. Poynter, who at the time of his testimony had been the Superintendent at the Wellington Detention Centre in Guelph since 1990, came to the Centre in August of 1987 as Deputy Superintendent. In that capacity he was a member of a "senior management team" of five people, the others being: George Simpson, Superintendent; Paul Mulhern, Senior Assistant Superintendent, Operations; Jim Hume, Senior Assistant Superintendent, Services; Mickey

Stevenson, Senior Assistant Superintendent, Programs. This team met at 9:00 a.m. every working day for forty-five minutes to an hour and a half, lunched together daily and had such other unscheduled meetings as circumstances required. He said that the matter of the Complainant's native heritage was never raised or discussed in any meeting in which he participated – at least, not until after the events of early 1988. In this regard, the following exchange with counsel is instructive (at Side A of Tape 1 for May 21, 1997, beginning at number 296):

Q. What was your reaction when you heard that Mr. McKinnon was raising the matter of his native heritage?

A. Well, I guess my first reaction was surprise at not having any knowledge of it, and I guess the way the issue was raised led me to believe that it was common knowledge, but in fact it obviously was not common knowledge. I knew nothing about it.

Q. So from the time you started at Metro East in August of '87 until this point in early '88, I think we'll find later, I think there's a reference to it in Mr. McKinnon's complaint suggesting that it was on or about April 13 of 1988 ... How would you describe your relationship with Mr. McKinnon [during that time]?

A. Uneventful. I don't recall anything, any event occurring before that.

Q. So starting at that point in April of '88, after Mr. McKinnon raised the matter of his native heritage, do you recall -- or let me ask you this -- what was the nature of the discussion at senior management committee? Do you recall any discussions at that point with respect to Mr. McKinnon having raised this matter of his native heritage?

A. I got the sense that a number of people reacted the same way as I did. Surprised that that was his background. As I say, I was left with the impression that it was not common knowledge.

I should think the appropriate use of the expression "common knowledge" does not require that the matter be known to every member of the defined group in question (such as every person employed at the Centre in whatever capacity and regardless of the period of employment). Rather, I take it that the expression is used to signify knowledge sufficiently widespread as to make it more probable than not that a member of that group knows of the matter, and that exceptions do not disprove the rule. Thus, that Mr. Poynter was surprised, and that he formed the *impression* that some of the other members of the management team were as well, does not establish that the Complainant's heritage was not a matter of "common knowledge" at the Centre in the normal

sense of that expression. More important, however, his testimony shows that early that year (in April of 1988, according to counsel for the Respondents) the matter was discussed by the members of the senior management team of which Mr. Hume was a member.

It is to be observed in this connection that Mr. Hume was closer to the Complainant in the chain of command and, therefore, more likely than Mr. Poynter to know of the Complainant's heritage and the situation in the admitting and discharge area relating thereto. That the Complainant's native ancestry was not a subject of discussion in the meetings of the senior management team during the preceding eight months does not mean that it was unknown to other members of that group. Indeed, unless they were given to idle gossip, one would not expect it to be discussed by them except in the context of some incident of legitimate concern, such as occurred in the spring of 1988. The Board did not hear anything from Mr. Simpson regarding these (or any other) matters. Although a named Respondent in these proceedings, Mr. Simpson did not attend even for the purpose of giving evidence, and I am quite unprepared to ascribe to his silence proof of anything adverse to the Complainant. The matter of Mr. Hume's knowledge will be dealt with in due course.

While few of the sixteen witnesses called by the Commission and the Complainant were asked about it, six of them were emphatic in their view that the Complainant's aboriginal heritage was common knowledge and several others testified that they had heard names that I find to be clearly suggestive of such a background in any person of whom they might be predicated. Other witnesses called on the Complainant's behalf were questioned narrowly about some specific incident (*e.g.*, a scurrilous message seen on a computer). It was also the uncontroverted testimony of the Complainant that he had been asked early in his career to allow his picture to be used in a poster regarding people of different racial and ethnic backgrounds working at the Centre.

In my view, the suggestion that those who were aware of the use of such so-called nicknames as "Running Bear", "Tomahawk", "McInjun", "Canoe" and "Wagon Burner" would fail to appreciate the likelihood that the person so referred to was of native ancestry defies credibility. However, I have no reason to think that those witnesses who, being unaware of any of these nicknames, disclaimed knowledge of the Complainant's heritage were untruthful in that regard,

or that those who had heard only the nickname "Chief" ought to be taken to have inferred his heritage from that alone. Consequently, while I believe awareness of the Complainant's native ancestry was widespread at the Centre even prior to the filing of his first human rights complaint, I am not prepared to find that it was a matter of "common knowledge" in the sense indicated previously – not that that is of any ultimate importance. What is of significance, of course, is that I find the Respondents to have been aware of the Complainant's native heritage at all relevant times.

That many of the "nicknames" previously indicated as having been attached to the Complainant were used with some degree of frequency was not in dispute. However, while Mr. Geswaldo confirmed that the use of many of these names in reference to the Complainant was known to him from the time they met in 1977, he maintained that it was not until after the "pow wow" incident that he had any inkling that the Complainant was a Canadian Indian. Even the sight of the Complainant in a ceremonial headdress at his wedding reception in 1985 did not raise a suspicion that the Complainant, whom he admitted knowing was called "Chief", "Running Bear" and "Tomahawk", might be a person of native Canadian ancestry. He said he thought it was a "joke"; but, surely, even as a joke, it would have been totally pointless unless the Complainant was of native Indian descent. Under cross-examination by counsel for the Complainant, Mr. Geswaldo went so far in defence of that position as to profess a current and abiding ignorance that any of these expressions carried North American Indian connotations. It was only towards the end of this exchange that he conceded that "of course" he knows that "Chief" (perhaps the least obvious of the three) has some reference to a person of Indian descent.

I found Mr. Geswaldo's lengthy testimony in this regard evasive, inconsistent and, in the final analysis, not credible. Even assuming that the rest of what he had to say was to be believed, his insistence on this point would in my view place him in the category of those who "protest too much". If, as in the end he maintained, "Chief" was the only "nickname" he applied to the Complainant prior to using the expression "pow wow" in a neutral way on one occasion only, then even if he knew of the Complainant's heritage it would be difficult to find on that basis alone that he had thereby infringed any of the Complainant's rights under the *Code*. Be that as it may, Mr. Geswaldo's lack of credibility in this regard serves to reinforce Mr. Bunting's evidence

(unchallenged under cross-examination) that this Respondent had on occasion referred to the Complainant as "Wagon Burner", "McInjun" and "the Big Indian".

In view of its affect on my assessment of Mr. Geswaldo's credibility, it is important to set out a considerable part of his evidence regarding the names applied to the Complainant. Although this part of his testimony begins with an apparent affirmation that he had personally used the names "Running Bear" and "Tomahawk" in relation to the Complainant, later in cross-examination he denied having done so. Since he does not think these "nicknames" have any native Indian connotations, and since he repeatedly asserted that they were acceptable to (if not, indeed, welcomed by) the Complainant because they were his "identity", they were what the Complainant "preferred and referred to himself as", it is rather puzzling that Mr. Geswaldo would adamantly deny having made use of them. After all, in his view there was "absolutely nothing wrong" with these terms, the use of which he readily attributed to others, including his fellow Respondent, Mr. James. It may be noted as well that Mr. Geswaldo's testimony in this regard was given in the present tense. He was stating what he purported to comprehend at the time of the cross-examination; and therein lies another inconsistency. If in December of 1996 he did not think these nicknames had any connection to native Canadians or to their culture, why would he have stopped calling or referring to the Complainant as "Chief" after the "pow wow" episode in 1988, as he claims to have done? The following is the salient part of the exchange that occurred between Mr. Geswaldo and counsel for the Complainant on December 3, 1996 (Side A of Tape 1, for that date, beginning at number 220):

Q. You also testified, though, that you had heard people call, *and that you yourself had participated in calling*, Mr. McKinnon, or referred to him, by the names "Chief", "Running Bear", "Tomahawk"? [Emphasis added.]

A. Yah.

Q. What do you think those names refer to? Why do you think they were being used about Mr. McKinnon?

A. They were Mr. McKinnon's nicknames.

Q. Why were these nicknames chosen?

A. Because that's what Mr. McKinnon preferred and referred to himself as. It was quite acceptable for people to refer to Mr. McKinnon as "Chief".

Q. Do you agree with me that each of these names, "Chief", "Running Bear", "Tomahawk" relates to or refers to aboriginal people, native Canadians? That's what each of these names are about?

A. No.

Q. They have no relation to native Canadians?

A. No. It's a matter of race? I don't think so, Mr. Wright.

Q. What does "Running Bear" mean then?

A. I have no idea.

Q. It's not a name that's supposed to refer to someone who's native, aboriginal?

A. If people want to refer to as that, they could.

Q. That isn't what it means to you?

A. Not to me.

Q. What does ["Running Bear"] mean to you then?

A. It's just a name. A nickname.

Q. ... and you didn't think [these names] had any link to native Indian status?

A. Not when it refers to Mr. McKinnon, no. ...

Q. I'm asking about the words generally, Mr. Geswaldo. You heard the word "Running Bear". That does not refer to someone who's native?

A. No.

Q. "Tomahawk"?

A. No.

Q. It's got nothing to do with native -- What is a tomahawk, Mr. Geswaldo?

A. I believe it's an axe.

Q. And who uses that kind of axe? What group?

A. The Atlanta Braves?

Q. ... Mr. Geswaldo, are you saying that your position is, you don't know that tomahawk is an Indian, a native Indian, tool? Yes, or no?

A. No.

Q. And "Chief" also has no reference to someone who is Indian?

A. Of course, "Chief" does, yes.

Q. Oh, now it does? Okay. So "Running Bear" doesn't, "Tomahawk" doesn't, but "Chief" does?

A. Well, because in sports people use these terminologies.

Q. Who else at the institution would have been called "Tomahawk", or "Running Bear", or "Chief"?

A. No one that I can recall.

Q. You don't recall anyone who was called that name, just Mr. McKinnon?

A. The reason is that -- because that was his identity.

Q. And you refer to the Atlanta Braves, and that name, I guess, "Braves"?

A. You can use "Washington Redskins", there's another.

Q. And those names, "Braves" and "Redskins" don't have any link to native Indians?

A. It's a name. It's just a name. ...

Q. Do you recall that there were concerns, protests, objections to the use of [the name "Braves"] and to the use of the "tomahawk chop" by native Americans?

A. You're right, now. ...

I pause here to draw attention to two inconsistencies that emerge from the preceding testimony. First, since Mr. Geswaldo knows, "of course", that "Chief" refers to "someone who is Indian", and although he personally referred to Mr. McKinnon as "Chief", how can he say that he neither knew nor suspected that the Complainant was a person of native Canadian heritage? Second, since it was Mr. Geswaldo who, unbidden, brought up the team names "Atlanta Braves" and "Washington Redskins" while under intense questioning as to the association between various names and aboriginal Canadians and their culture, how can he then maintain that he does not know that these team names relate in some way to North American Indians? Having offered them up in this context, he retreats to the position that they are just further examples of names used in sports. If, however, he was merely looking for examples of "names, just names" used in sports, one may wonder why he did not pick such other team names as the "Toronto Maple Leafs", or the "Toronto Blue Jays".

It is simply beyond doubt that it was the discussion of native Indian names that evoked Mr. Geswaldo's reference to the "Braves" (whose logo involves a tomahawk, as he later admits) and the "Redskins" (whose logo is an Indian head replete with headdress, as he probably knows).

Just as he knew that these team names relate to such Indian peoples, he obviously knew that the tomahawk is primarily associated with them and that in their culture they frequently adopt the names of animals whose attributes they admire. Indeed, during his prior examination-in-chief (part of which is set out later in another connection) Mr. Geswaldo complained that: "this man's been referred to, to as 'Chief', '*Indian* Tomahawk', et cetera, et cetera, et cetera, and all of a sudden when I say the word 'pow wow', and he's making a complaint." How could he have qualified the word "tomahawk" with the word "Indian" during his examination-in-chief and then under cross-examination profess that even as he was testifying he had no inkling of the connection between them? Obviously, he was not being truthful. In any case, the cross-examination continued as follows:

Q. ... you're telling this Board that it's just pure coincidence that Mr. McKinnon who had native heritage -- it's pure coincidence that these names "Chief", "Running Bear", "Tomahawk" were attached to him?

A. No, I'm not gonna say it's pure coincidence. I'm telling you that was his identity. That's how he referred himself as.

Q. "Running Bear"? "Tomahawk"?

A. Sure.

Q. When?

A. I don't have to give dates, 'cause I don't know the dates. ... What I'm trying to tell you Mr. Wright is that Mr. McKinnon referred himself as "Chief" and "Running Bear", and was quite acceptable to people to call him that until 1988.

Q. So you're now saying Mr. McKinnon referred to himself not just as "Chief", but also referred to himself as "Running Bear"?

A. [After evasiveness necessitated my intervention requiring an answer, the witness said] What was the question?

Q. Did Mr. McKinnon refer to himself as "Running Bear"?

A. Sure.

Q. You heard that?

A. Well, if I heard it -- it was, ah, it was -- I can't say if I heard it -- it was acceptable.

Q. Did you hear Mr. McKinnon call himself "Running Bear"?

A. No.

Q. Did you hear Mr. McKinnon call himself "Chief"?

A. Yes.

Q. So your view is that there is nothing wrong with the use of the words "Chief", "Running Bear", "Tomahawk" ... to refer to another worker in the institution?

A. Mr. Wright, from 1977 to the date he made his complaint it was acceptable. After the date he made his complaint I became aware that he was native, it was not acceptable for someone to criticize him, just as it's not acceptable for Mr. McKinnon to call me a "wop".

Q. So it's only not acceptable after he makes a complaint, that's what you're telling the Board?

A. No, you're saying it's not acceptable whatever, but I'm saying in Mr. McKinnon's case, where it was acceptable -- how he identified himself and how other people would refer him to as "Chief". And he had made no complaints. That it was okay. Because that was his nickname. But once he made his complaint I became aware that he was native and I never used the word "Chief".

Q. So, Mr. Geswaldo, are you telling the Board that there is anything wrong with using the terms -- I'm not talking about Mr. McKinnon's case -- in using the terms "Chief", "Tomahawk", "Running Bear" to refer to a co-worker in the institution if the co-worker has not objected? Is there anything wrong if there's no objection by the co-worker?

A. I just told you, there is something wrong.

Q. There is something wrong. All right --

A. Sure.

Q. Thank you. But you said it's not wrong with Mr. McKinnon because it was done all the time for a number of years. That makes it okay --

A. What makes it okay is because that's what he wanted people to refer him as to.

Q. Did he ever ask you to call him "Chief"?

A. Sure.

Q. When? ... what did he say to you? "Frank, call me "Chief"?"

A. I wouldn't say "Frank, call me "Chief". It's just that I would always refer to him as "Chief".

Q. [After a series of questions eliciting the admission that the witness had never heard the Complainant ask anyone to call him "Running Bear" or "Tomahawk", he was asked:] So, you're now saying it was okay to call Mr. McKinnon "Tomahawk" or "Running Bear". There's nothing wrong with that. Nothing inappropriate with that.

A. Until '88, yah. Again, I'll tell you that's how he referred himself as to.

Q. [By Chairperson] You just said you never heard him call himself by those names.

A. Oh, I heard other people call him all those other names.

Q. [By Chairperson] But you just said that "he referred himself as". Those were you're words.

A. What I'm saying, Mr. Chairman, is from 1977 to the day he made his complaint it was quite acceptable for people, like myself, to refer Mike [Mr. McKinnon] as "Chief". Other individuals would use "Tomahawk", "Running Bear", that is true. It was quite acceptable for him. That was his status, that was his symbol. That's what he identified himself as.

Q. Do you mean to tell us you never called him "Tomahawk" and "Running Bear"?

A. I never said that.

Q. But you didn't think there was anything wrong when other people did it?

A. What time frame, Mr. Wright?

Q. Up to 1988.

A. Absolutely nothing wrong with it.

Q. And that's because he didn't object?

A. That's correct.

Q. Anything wrong with calling a black officer a "nigger" ... if he doesn't object?

A. There's still something wrong with it. ... It's demeaning a person.

Q. It's not demeaning to be called "Tomahawk"? Is it demeaning to be called a "wop"?

A. Sure -- sure it is.

Q. But not "Tomahawk"?

A. No.

The Complainant testified that he neither welcomed nor encouraged any of this racially based name-calling and behaviour and that, although bothered by it, he did not voice his objections to such conduct prior to the "pow wow" incident because he "felt he had to go with the flow", that he had "to try to mix in". According to him, prior to that incident he would react with silence, or by walking away. It was put to me in argument that that was not believable, given the Complainant's "aggressive" personality as described by many of the witnesses, the suggestion

appearing to be that the use of these "nicknames" prior to the events leading to his first complaint did not really bother him, and that his subsequent umbrage was feigned for ulterior purposes. However, the Complainant's belated but vigorous and legitimate defence of his own interests, as well as the interests of others he represented from time to time in his capacity as an officer of the union, does not prove him incapable of having put up with unwelcome behaviour prior to the triggering events after which, by his own account, he had had enough and was no longer prepared to suffer in silence. In any case, I find untenable the implication that, having once accepted it, the victim of racist name-calling is estopped from complaining about its continuation or repetition.

The Complainant denied ever having referred to himself by any of these names and, apart from Mr. Parulski, no one other than the two Respondents, Messrs Geswaldo and James, suggested that he ever had. Mr. Parulski had been a correctional officer at the Centre between "roughly" 1979 and 1986, and his testimony given during his examination-in-chief regarding this issue was as follows (Tape 1, Side B, September 5, 1997, beginning at number 148):

Q. Did you ever hear the nickname "Chief" in relation to Mr. McKinnon?

A. Yes I did.

Q. Can you help us with the circumstances of that?

A. It was at a party -- I think it was a Halloween party, if I'm not mistaken, that we had at the East there [the Centre] for the staff, and Mr. McKinnon was dressed as a "Chief" -- an Indian Chief, that is -- and I don't know whether he was married yet or not, but Ms McKinnon --

Q. Mrs. Vicki Shaw-McKinnon?

A. Vicki Shaw-McKinnon was dressed as an Indian squaw. And it was like -- I don't know the exact words -- call me "Chief" ...

Q. Who was saying that, "Call me 'Chief'?"

A. Well, Mr. McKinnon was. He says, I'm the "Chief" and this is my squaw.

Q. And after that particular party occasion, were there times when he would invite others to call him "Chief", or people would call him "Chief"? Did that nickname sort of stick?

A. The nickname stuck, yes.

Mr. Parulski's evidence about this incident under cross-examination was as follows (Tape 1, Side B, *ibid.*, beginning at number 320):

Q. You testified about a party, Halloween party, and it's my understanding that this party occurred approximately in 1979.

A. I don't know when it occurred.

Q. Before the Stalteri incident? [*i.e.*, the 1982 firing-rehiring incident previously referred to.]

A. As far as I recall, yah.

Q. Now, you testified that Mr. McKinnon came dressed as a "Chief" and Mrs McKinnon came dressed as a squaw. Mr. McKinnon and Ms McKinnon will testify that in fact she came dressed as a cowgirl, wearing a cowboy hat and western boots. Are you going to say that that was not the outfit she was wearing?

A. Not a hundred percent. But it's a long time ago, eh?

Q. Both Mr. McKinnon and Ms McKinnon will deny that Mr. McKinnon ever said "this is my squaw". Are you certain that happened?

A. Oh, yah, I'm sure -- I'm certain that happened.

Q. So you can't remember the event described in your note of 1985 [Exhibit 245, being a handwritten memorandum of an alleged threat by Mr. Simpson that "if he did not mind his own business he would end up on 2B like that other officer", *viz.*, Mr. McKinnon], but you are certain about this event that happened a number of years prior to that.

A. Remember, I was at the party and different people were at the party, different things happened. You know -- if there's some way I can say -- you have, you have to jog my memory, I'd appreciate it if you tell me. But I can't recall it right at this time. You know in nineteen-and-a-half years with the Ministry there's a lot of incidents and occurrences that have happened.

In my view, although I have no reason to doubt his honesty, on a balance of probabilities Mr. Parulski's recollection of the Halloween party must be seen to be mistaken. While initially he thought Ms Shaw-McKinnon had dressed for the occasion as a squaw, he later revealed his uncertainty as to her costume. It was a long time ago, and he was not "a hundred per cent" sure. It was her evidence in reply that she had gone to the party as Annie Oakley, dressed in a cowgirl's outfit and wearing a cowboy hat and western boots. In my view, generally speaking, the wearer's description of what she wore to a costume party nineteen years ago is more likely to be accurate

than the recollection of some other party-goer who says he is "not one hundred per cent sure" because "it's a long time ago". If that aspect of his recollection is faulty, then the rest of it might be as well.

The dependability of Mr. Parulski's recollection of something of no personal importance that occurred in 1979 is made even more suspect by his inability to recall a much more recent occurrence of a sufficiently threatening character to him personally as to have caused him to write an *aide memoir* of sorts, evidently to be used should the threat materialize (in which respect see Exhibit 245, which is dealt with more fully elsewhere in these reasons). Mr. McKinnon confirmed that he attended the party in native Indian attire, not as a joke, but because he is proud of his heritage. He swore that he has never called or referred to his wife as a "squaw", and she denies that he ever did so to her knowledge. I believe them.

Name-calling, of course, was not the only negative aspect of the setting in which the "pow wow" comment must be considered. Mr. Bunting described the situation at the Centre where he was employed between 1984 and 1992 as "the worst work environment I had ever worked in." Mr. Johnson, who worked at the Centre from 1982 to 1990, said that he took a demotion in order to "get out of there". As already mentioned, Mr. Weekes gave evidence about a racist caricature of the Complainant. Mr. Beckta related an incident that occurred in the admitting and discharge area sometime between 1982 and 1985 while he was assigned to work there. He said that he and other co-workers donned headbands with feathers and gleefully awaited Mr. McKinnon's arrival in the area. When his entrance was greeted with war whoops, dancing and laughter, the Complainant got red in the face and left the area, clearly embarrassed. Since it would be utterly pointless otherwise, it is beyond question that those who would stage such a prank would believe the butt of their humour to be a person of North American Indian descent. Mr. Beckta, who expressed his remorse over having participated in this incident, identified Mr. Geswaldo as the person who had distributed the headbands. Although Mr. Geswaldo denied having been there, his presence on that occasion was sworn to by the Complainant as well. There is no apparent reason for Mr. Beckta to have been untruthful, and in view of the dubious character of Mr. Geswaldo's evidence in other respects, I accept the evidence of the Complainant and Mr. Beckta regarding this incident.

It was in this setting that the "pow wow" episode described in paragraph 3 of the first complaint is alleged to have occurred – a setting that, according to Mr. Gallina, included the use of the expression "pow wow" in relation to the Complainant in a context that was not neutral, namely, his attendance at gatherings of Canadian Indians and his going home to be with his wife. The Complainant's version of the event in question was basically a repetition of the relevant paragraphs of his complaint. He said that he and Mr. Stockwood were working in the admitting and discharge area under the supervision of then Acting Corporal Geswaldo. While they were standing by the Sergeant's desk, dealing with documents required for inmates coming back from court appearances, Mr. Geswaldo came back into the area, spotted them and, according to the Complainant, said "he couldn't believe us guys" and asked whether they were having a "pow wow". The Complainant said he went around the corner to where Mr. Geswaldo was and asked him why he would use the phrase "pow wow", to which question he says the response was: "Are you a 'fuckin Indian'?" The Complainant said he replied that while he was not a "fucking Indian", he was indeed an Indian, at which Mr. Geswaldo started laughing and said he did not know that.

Mr. Stockwood mentioned two episodes involving the use by Mr. Geswaldo of the expression "pow wow". He testified that on one occasion he and the Complainant were very busy working in the glassed-in control room of the admitting and discharge area when Mr. Geswaldo came up on the outside and the following occurred (from Side B of Tape 2, May 23, 1996, beginning at number 142, but omitting the questions put by counsel for the Commission):

He [Mr. Geswaldo] started banging on the windows, asking what was the delay, and then made a statement to -- "what are you having" -- "what are you doing in there, having a 'pow wow'?" [This was said by the witness in an aggressive tone obviously meant to mimic the way in which he alleges these words were said.] ... If I remember correctly, I believe Mr. McKinnon went over to the window and I believe he told Frank just to fuck off. ... [Mr. McKinnon] was quite upset. Mr. Geswaldo just turned around and walked back into the admitting area. ... I don't know really how to describe [Mr. McKinnon's upset] -- he seemed to be really "pissed off" at the comment that was made. ... There was another incident with myself and Mr. McKinnon. We were around the sergeant's desk -- or back then I believe it was corporal's -- in the admitting area when Mr. Geswaldo made the same comment that he made earlier at this control room, that we were gathered around having a "pow wow". ... [His tone] was sort of a belittling. ... I wouldn't

consider it [as a type of joke or humour], no. ... If I remember correctly, as soon as the comment was made, I dropped what I was doing at the desk because Frank was of the attitude that nobody knew everything that he knew, and I just dropped the papers and that, that I had, and left the area. ... I judged from the comment that was made that [he thought] we were working too slow.

While Mr. Geswaldo denied that the "pow wow" incident as described by the Complainant and Mr. Stockwood had occurred, he admitted that he had used that expression in the Complainant's presence sometime around that date, but that he had had no idea then that it was in any way associated with native Indians. As to the first of the two episodes in which that witness said he had used the expression, Mr. Geswaldo said "Mr. Stockwood is a liar"; and, as to the second episode, he said "Well, he's lying again".

Mr. Geswaldo's recollection was that the occasion on which he used the expression "pow wow" was a busy day in which a great many inmates were coming through the "bull pen" and there was a shortage of staff to deal with them. He said that, although he had called for more staff, the Complainant felt that everything should stop until a full complement was in place, whereas he took the view that the inmates already there had to be processed. Mr. Geswaldo said that this led to tension between them that day that was later heightened by a rancorous confrontation regarding a co-worker named Donny Bruce who was a member of a Canadian weight-lifting team, and someone of whom Mr. Geswaldo said the majority of the staff were very proud. According to him, Superintendent Simpson had arranged Mr. Bruce's shifts to accommodate his training requirements for an upcoming international competition, but the Complainant objected. I think it important to relate Mr. Geswaldo's testimony in this regard (as found at the start of Side A of Tape 3 for September 18, 1996):

Mr. McKinnon disapproved of Mr. Bruce working particular hours during the week, and it was a point that he agitated Donny Bruce to the extreme where there was going to be a physical confrontation between the two staff members. Me being the supervisor in that area I had to take a step, and my step was to control Mr. Bruce. I basically convinced Mr. Bruce to come into the back area, which was the property department, and I told Donny -- and I told anyone else who was interviewed regarding this incident -- that McKinnon was not worth it. I says, he's not worth your job, he's not worth you going through what you would have to go through if a physical confrontation had occurred. He's not worth it. I left the property department and went straight up to McKinnon and I voiced my

displeasure to him. Number one, I stated that he had no right agitating Donny Bruce. Number two, that he had no right to complain that he was working these particular hours. That uh -- I told him he should be proud knowing the fact that Mr. Bruce was representing Canada. And that it was not his concern or his business why the superintendent, Mr. George Simpson, granted Mr. Bruce these particular hours for the week. And, Mr. Chairman, I told him back then, and I'll tell him today, I told Mr. McKinnon to back off and leave him alone. And we both -- I think we both went to lunch at the time. Just went our separate ways. And I think it was during -- it was after supper, I believe between six and seven -- I just -- there were -- one of the staff members had brewed a fresh pot of coffee, and I just said to the staff members, "Why don't we just get along here and let's just have a cup of coffee and a 'pow wow'." Next thing you know I'm here today.

Q. [By counsel for the Respondents] During your conversation with Mr McKinnon, at any time either before or after you used the word "pow wow", did you -- were you laughing, did you find anything humorous about what you were doing --

A. No, I didn't find anything humorous. I didn't find nothing humorous because Mr. McKinnon was the one agitating the staff. And I was basically trying to settle things down.

Q. He would then say that he said to you that "I was not a fucking Indian, but I was an Indian". Did he ever advise you on or around this time that he was an Indian?

A. When we had our little meeting in the boardroom. But regarding this, no, this came up -- that came after.

Q. Before the boardroom meeting --

A. Well -- that -- nothing like that occurred, 'cause we weren't speaking, we weren't talking, I wasn't talking to the man. -- 'Cause he was basically agitating the staff down there.

When asked by counsel for the Commission whether he had had no sense that Mr. McKinnon was upset by the comment, Mr. Geswaldo replied: "When? When I said 'pow wow'? No, I think he was upset because I told him to back off of Donny Bruce, more than anything else." However, when cross-examined on this point by counsel for the Complainant, Mr. Geswaldo admitted that no occurrence report had been filed either by him, or by Mr. Bruce, who had not lodged any complaint, and that there had been no physical contact between the alleged antagonists. He said as well that he was unaware that the Complainant in his then capacity as a union steward had arranged Mr. Bruce's schedule and special leave. Although thus alerted, the Respondents did not

call Mr. Bruce or anyone else to testify to the contrary, and the Complainant's predictable evidence in reply was that he had helped Mr. Bruce in getting time off for training and that relations between them had been cordial.

Mr. Geswaldo was unable to identify any of the persons he invited to gather around for coffee and a "pow wow" in order to improve staff relations, and his suggestion that he had addressed the expression not to the Complainant, but to others, does not seem to have been brought to the attention of Lieutenants Hill and Meloche when the matter was dealt with subsequently. There is nothing in any of the exhibits to that effect, nor was any reference made to it by Lieutenant Hill in his testimony. Having already found that Mr. Geswaldo knew of the Complainant's native heritage at the time of the comment, it seems to me more likely than not that that is why he used the expression "pow wow" in venting his annoyance. I think it clear on the evidence that the words were addressed to Messrs McKinnon and Stockwood in a sarcastic manner because of their perceived slowness and that it was this, and neither rancour over being short-staffed, nor the alleged scolding for "agitating" Mr. Bruce, that upset the Complainant to the point of his taking the matter up with the next level of management some weeks later following another incident.

The Complainant claims as well that when at the time of the "pow wow" episode he confronted Mr. Geswaldo about his choice of words, the response was: "What are you, a 'fuckin Indian'?" He went on to testify that some six weeks later, on May 26, following what he indicated to be a fruitless meeting between them arranged by Lieutenants Hill and Meloche, Mr. Geswaldo asked yet again whether the Complainant really was a "fuckin Indian". Although Mr. Geswaldo denies that he said these words on either of these occasions, having found his evidence lacking in credibility regarding both his knowledge of the Complainant's heritage and the "pow wow" incident itself, as to which the substance of the Complainant's evidence was corroborated by Mr. Stockwood, I draw the conclusion that he did make these additional comments on these two occasions as alleged in the first complaint. The meeting in question was precipitated by an incident that the Complainant alleges to have occurred earlier that day and which is referred to briefly in the complaint as follows:

11. On May 26, 1988 at approximately 4:30, I was searching an inmate in the search area. As the inmate was taking off his clothes, Cpl. Geswaldo walked by. Moments later, he returned and said that the proper way to do a search was to wait until I had a cover while in the pit area.

The Complainant said that as a result of Mr. Geswaldo's intervention the inmate got his things together and returned to the holding area, and that he was embarrassed and his authority in front of an inmate had been undermined. The "cover" needed while searching an inmate is the presence of another officer who can see the search in order to assist, or bear witness, in the event of problems. On this occasion, according to the Complainant, an officer by the name of Wickens was at the computer table in the adjacent area in a place where he said it is not uncommon for the needed backup to be. However, Mr. Geswaldo insisted that the "cover" had to be right "in the pit" during the search. The Complainant said when he asked Sergeant Casey about the proper protocol he was told that the way he had proceeded was "okay" and that Acting Corporal Geswaldo was wrong to tell him otherwise.

When cross-examined regarding this incident, Mr. Geswaldo maintained that the whole point was that the "cover" had to be able to see the search and that this could not be done from the computer table because of the height of the half-wall separating the areas. When it was suggested to him that there was a mirror located on the wall that enabled someone at or near the computer table to see into the search area, Mr. Geswaldo at first said that the mirror only lets you see down the hall. However, after further questioning he declined to say what could be seen through the mirror without going back to check it out. As a result I attended at the Centre with the parties to view the facility, and I came away satisfied that the search area could be adequately seen by means of the mirror.

While this episode is in itself of a relatively minor nature and not overtly connected with harassment on a basis prohibited by the *Code*, it is one of several other alleged incidents raised in evidence that occurred around the time of the "pow wow" episode, the cumulative effect of which led the Complainant to complain to Lieutenants Hill and Meloche. The Complainant alleged

that he was being targeted by such conduct because of his native heritage. Given Mr. Geswaldo's previous racist taunting of the Complainant (the "pow wow" and "fucking Indian" incidents), and in the absence of any legitimate reason for such treatment, I would draw the inference that this conduct was similarly motivated.

As to the particulars of the rest of that conduct, the Complainant began by saying that when he was assigned to the admitting and discharge area where a lot of different documents are processed he asked for some training because it was the first time he had worked there, but that Mr. Geswaldo told him: "If you can't stand the fucking pressure, get out". He went on to say that Mr. Geswaldo was:

... always hovering about me, I'd be working on a computer, he'd come by and turn the computer off, and then say "I thought you were using my computer Code". He would give me directions to disperse bodies and then say, "Come back, I'm going to get you to do this instead -- search the pit". His conversations when there'd be down time in the area would be with other staff. And he'd invite them out for a drink. Everybody. I'd be excluded. Pouring coffee -- any drinks for anybody -- I'd be excluded. Nodding his head just constantly every time I was doing something. He'd just nod negatively. Made me second guess everything I was doing.

Mr. Geswaldo denied these allegations. He said that he had provided the Complainant with "hours of training" *before* he started in the admitting and discharge area. He went on to say that the Complainant advised him when working in the area that he had had no training and that, therefore, he (Mr. Geswaldo) spent time explaining procedures, but was not "hovering" as the Complainant had said. There is, as my notes made when hearing this testimony indicate, an inconsistency between the assertion, on the one hand, that "numerous hours of training" had been given to the Complainant by this Respondent *before* the Complainant began this work and, on the other hand, the solicitous provision of additional training (not to be confused with hovering) allegedly occurring *after* the Complainant had started and, *ex hypothesi*, ungrudgingly given in response to a false assertion that no prior training had been provided despite Mr. Geswaldo's having supposedly devoted hours to the exercise.

It was the Complainant's evidence that, following this incident he met with Lieutenants Hill and Meloche on May 26 and told them that he wanted Mr. Geswaldo to stop making comments about his ancestry and to stop targeting him in the area. Their response was to set up a "one-on-one" meeting between the two antagonists. The Complainant said he told Mr. Geswaldo when they met in the boardroom that he was "tired of being targeted and the racial slurs", and that the response was that "no one is out to get you", that he was too sensitive and that the Respondent was "not going to change for me". He said they discussed his wedding and the wearing of the headdress and his ancestry and that Mr. Geswaldo "thought it was a fucking joke" – which, by his tone of voice, I took the Complainant to mean that the Respondent was suggesting that his status was worthy of ridicule rather than one theretofore believed to have been humorously feigned.

The Complainant went on to say that Mr. Hill entered the room toward the end of the meeting and indicated that he would be "passing on our concerns to the superintendent", that he would advise the superintendent "that a conflict had arisen between Frank and me". The Complainant assumed that the matter was not over, and that the superintendent would deal with it. When asked by his counsel he said that he did not feel "that the matter was resolved at this meeting", and when asked why, he replied:

I knew they weren't resolved because, when walking down the corridor at the end of the meeting, Frank said, "Are you really a fucking Indian?" I said, "Frank, doesn't anything sink in?"

Mr. Geswaldo's account of this meeting is, of course, quite different. He said he thought that both Mr. Hill and Mr. Meloche got in touch with him and that when he walked into the office where they were waiting they "advised me that Mike was upset that I was using racial slurs". The following exchange then took place between Mr. Geswaldo and counsel for the Respondents (Side A, Tape 3, September 18, 1996, at number 127):

Q. And did they indicate to you what in fact it was alleged you were saying, . or had said?

A. I don't really recall that they had mentioned anything, but I do recall what I said to them. I said, "I said the word 'pow wow' guys." I said, "I don't think that's a racial slur." And Meloche and Hill said, "Why don't you and

Mike go in the boardroom and talk this out?" I said, "Sure, I don't have a problem with that."

Before proceeding with the rest of this exchange, I want to draw attention to the apparent inconsistency of that last answer with Mr. Geswaldo's earlier evidence regarding his use of the term "pow wow". His testimony was not simply that he disagreed with the details of the incident as described by the Complainant and Mr. Stockwood; rather, it was tantamount to a denial that the incident had even occurred. He said that the only time he used the expression "pow wow" was when he was in a room with a number of staff members, and that "because the Complainant was the one agitating [not merely Mr. Bruce but] the staff" he, Mr. Geswaldo, was "basically trying to settle things down", to which purpose he "just said *to the staff members*, 'Why don't we just get along here and let's just have a cup of coffee and a pow wow.'" He went on to firmly deny having had any conversation at all with the Complainant about the use of the expression "pow wow". According to him, they did not talk about it then, nor at any time afterwards until their meeting in the boardroom. Yet, when on May 26 he was told by these officers *prior to meeting with him* that the Complainant had accused him of making racial slurs, the substance of which he does not recall being mentioned by them, he blurted out defensively: "I said the word 'pow wow' guys. I don't think that's a racial slur".

At that point of time, Mr. Geswaldo adamantly insisted, he did not think that the expression had any native Indian connotations at all, nor did the Complainant give him any reason to believe that he was of native Indian ancestry until they met *after* this protestation of innocence was uttered. However, it is only if his previous testimony is untrue that he could conceivably infer from the bare statement "you have been accused by the Complainant of making racial slurs" that the allegedly offensive words must have been "pow wow". Moreover, since the alleged offence was of a racist character, how could he have thought that it might consist of the words "pow wow" without knowing that the expression has an Indian connotation and that the Complainant was, or might very well be, a person of such heritage? This is but one of the many inconsistencies in Mr. Geswaldo's testimony the cumulative effect of which leads me to prefer the evidence of the Complainant to his wherever they conflict. But this exchange with his counsel, the significance of which will be seen presently, went on as follows:

Q. Mr. McKinnon in his evidence indicates that you did not say anything about the allegations in the I.C. office. Do you remember saying anything other than what you've just told me?

A. No.

Q. And, so you moved into the boardroom, and what happened.

A. Well, the meeting was no longer than, say, I'd say fifteen, fifteen minutes between the both of us. And we both walked into the board room, and both sat down, and next thing you know McKinnon grab's a piece of paper and a pen, and he starts writing stuff down. I said, "What are you doing?" He didn't reply. And this is where he starts telling me that he's an Indian.

Q. He indicates in his evidence, that he said to you that he expressed his displeasure about racial slurs and being targeted. Do you recall his having --

A. Well, the racial slur would be the "pow wow". And the part where he says being targeted is that regardless of how I made the attempt to relieve his concerns it was not satisfactory.

Q. Targeted. Did he give you any explanation as to what he meant by targeted? Or what did you conclude, if you heard the term? Did you hear the term "targeted"?

A. No.

Q. But if he had used that term, what's your understanding of --

A. Well, my understanding would be the -- the displeasure that he had because we were short of manpower, short one man.

Q. Mr. McKinnon would indicate that you said to him at some point "Nobody was out to get him." You said that he was too sensitive, and you weren't going to change for him. Do you recall having said something along those lines?

A. No, sir.

Q. And then, he says you asked him, Mr. McKinnon, if he was a fucking Indian. He said you thought it was a fucking joke in reference to, Mr. McKinnon's reference to his ancestry. ... Do you recall having said that?

A. No, sir. But what I did tell him was that -- I told him very straight, very direct, I said "Mike, what is going on here?" I says, "For the past ten years, since 1977, people have commented the word 'Chief', 'Tomahawk', 'Running Bear' and I say the word 'pow wow' and you're making these allegations of me saying slurs." I says, "What's the real issue here?" I also told him, I says, "I find this totally ironic, when I attended your wedding and other staff members placed a headdress on you, and without your knowledge, and as the whole place was laughing with you. And I say the

word 'pow wow' and you're making these complaints?" Again I stressed, "What are the issues here?" This is where McKinnon informs me that he felt that I should not be supervising. He felt that I didn't take my job serious enough.

Q. Just a minute now. He felt that you should not be supervising him.

A. That's correct.

Q. You didn't take the job serious enough?

A. I didn't take the job serious enough. That he was lodging a human rights complaint. That he was seeking out -- seeking to get advice from the Labour Board. And I'm sitting there looking at this guy and saying, are you for real or what? That's exactly what I told him, I said "Are you for real?"

Q. Was there anything else that transpired at this meeting?

A. Yes. I basically told McKinnon straight out flat that I was not interested in his comments about me being his supervisor and that if he had any concerns regarding me supervising in the admitting department to go directly to my superior which was Mr. George Simpson. And then he goes on and saying that human rights are going to fire me and I'm supposed to pay this ten thousand or twenty-five thousand dollar fine.

Q. Just a minute now. He said what?

A. He said [and the witness permitted himself a chuckle of incredulity] -- he said human rights were going to find me guilty and I was going to pay the fine -- ten to twenty-five thousand dollar fine -- and I was going to lose my job.

Q. Up to this point of time, we're talking now May of '88, had Mr. McKinnon ever told you that he was going to pursue a human rights complaint?

A. Before this? ... No.

Q. Had you ever heard any talk around the institution about Mr. McKinnon's commencing a human rights complaint?

A. No. ...

Q. He then indicated in his evidence that after the meeting you accompanied each other down the hall and you said to him, "Are you really a fucking Indian?" And he said in response, "Frank, doesn't anything really sink in." Do you recall that having taken place.

A. No, sir.

Q. And when I ask you whether you recall it, I'm asking you, do you in fact remember saying those words?

A. No, sir.

Q. Now, was there anything -- did you have any further contact with Hill and Meloche as a result of this meeting? Did anything come of this meeting that they followed up on? Did they come back to you at any time?

A. As far as I recall, when I left the boardroom I went directly to the I.C.'s office and advised Meloche and Hill that the issue was resolved. 'Cause that's what McKinnon and I had left it at, resolved.

Q. Why would you say "resolved"? What was resolved? What had been resolved?

A. The part of me saying the word "pow wow".

Q. I don't understand. What was it that you -- how would it -- how's that then resolved? Was there some understanding that you wouldn't say it again, or that it had been said, it hadn't been said, what was it --

A. I basically left the room in saying that I didn't understand -- what the -- what the issues were when -- when, since 1977 this man's been referred to -- to as "Chief", "*Indian* Tomahawk", et cetera, et cetera, et cetera, and all of a sudden when I say the word "pow wow" and he's making a complaint. So we both left the room as being okay, fine, that's how you feel, this is how I feel, we'll leave it at that. We left the room. [Emphasis added. Note that this testimony was given *before* his insistence under cross-examination that he knew of no connection between tomahawks and Indians.]

Q. [By Chairperson] You say that it was resolved?

A. The impression he gave me was that the discussion was resolved.

Q. [By Chairperson] Meaning what?

A. Meaning that, me saying the word "pow wow" obviously had upset him, and that that was fine. No problem. If the word "pow wow" upset the man, well then fine.

Q. [By Chairperson] All right, perhaps counsel can ask you further. I don't understand what you're getting at -- things were resolved --

A. What I'm saying is that when we left the room --

Q. [By Chairperson] The dispute was settled?

A. The dispute was settled. No more issue between us.

Q. [By Chairperson] He was happy, you were happy?

A. That's right.

Q. [By Chairperson] So he wasn't going to do anything.

A. That's right.

Q. [By Chairperson] There wasn't going to be this human rights thing and the ten to twenty-five thousand dollar fine --

A. Exactly.

Q. [By Chairperson] -- He said forget all that; is that what --

A. He didn't say forget all *that*. He agreed that the issue that was discussed in the room was resolved.

Q. [By counsel] Did he actually say that to somebody, or did he just say it to you?

A. He said it to me. 'Cause I was the one who told it to Meloche and Hill that it was resolved.

Q. I'd ask you whether there was anything further. Did you have any conversations with Mr. McKinnon about this meeting, any further conversations. ... Anything with Hill and Meloche about this meeting, apart from what you've already told us?

A. No, sir.

There is no suggestion in all of this that Mr. Geswaldo had offered even a qualified apology, such as expressing regret that his use of the term "pow wow" had been misinterpreted or found in any way offensive, nor any suggestion of an admission by the Complainant that he might have over-reacted and was going to withdraw his complaints and abandon the alleged threat of seeking the intervention of outside agencies that might impose heavy fines and cause the loss of the Respondent's employment. Yet, this Respondent maintains that when they left this most acrimonious of meetings their differences had been resolved.

As indicated by my own questioning of Mr. Geswaldo on this point, and as I wrote in my notes at the time, his testimony in this regard made no sense. It is clear that the Complainant (for whatever reason) was sufficiently upset by Mr. Geswaldo's conduct as to procure the intervention of their superiors that led to the meeting arranged by them. It is simply unbelievable that at the

end of that bitter encounter they indicated their mutual satisfaction with how it had gone, that the Complainant told Mr. Geswaldo that he "wasn't going to do anything", and that while he did not say "forget about the human rights thing and the ten to twenty-five thousand dollar fine", he expressly agreed that the issue that had been discussed in the room was resolved, the proof of which, according to him, is that he "was the one who told it to Meloche and Hill that it was resolved". In my view, this testimony cannot stand up to proper scrutiny and adds to the implausibility of Mr. Geswaldo's evidence.

One of the Complainant's contentions is that the failure of management to take proper investigative and other appropriate action regarding his various complaints was discrimination contrary to the provisions of the *Code* in that they knew the basis of his complaints to be an allegation of harassment because of race and ethnic origin; hence, the importance of the assertion that this particular complaint brought to management's attention had not been resolved and that the Complainant was awaiting further action or developments that never materialized. Apparently, someone told Mr. Hill that the matter had been resolved and, as it was in his interest to do so, I have no doubt that Mr. Geswaldo was, as he claimed, "the one who told it to them" – and, I believe, the *only* one. While Mr. Hill's May 26 occurrence report addressed to Mr. Simpson indicated that "both parties informed me that the differences of opinion had now been resolved" (Exhibit 123), I think he was mistaken in that regard, a mistake that was simply repeated in his July 14 addendum to that report sent to Mr. Poynter at his request (Exhibit 124).

I found Mr. Hill's testimony regarding this matter somewhat confused. He recalled that he and Mr. Meloche arranged a meeting between Messrs Geswaldo and McKinnon, but he said that he did not recall anything about racial slurs being involved and that he would have said so in his initial report (Exhibit 123) had the Complainant told him that that was what it was about. Later, when shown exhibit 124, which, unlike the previous exhibit, does refer to the racial slur, identifying it as "pow wow", he explained that he had not mentioned it in the previous report because he had been asked by the Complainant to keep it confidential. However, his belief that both parties must have told him that they had resolved the matter was based on his conviction that he would otherwise have had them prepare occurrence reports. While Mr. Hill may have been testifying to the best of his recollection, I think he was mistaken in this regard, not only because

it contradicts the only vestige of Mr. Geswaldo's testimony that rings true, but because it is inconceivable in the circumstances as described by either of these antagonists that they could have come away from that meeting with the mutual understanding that the matter was behind them.

While the Complainant testified that he had wanted the matter kept confidential *from the staff in general*, it was far from his purpose that the gist of his complaint be kept from the superintendent to whom, I would have thought, Mr. Hill had an obligation of complete candour. The Complainant's testimony in this regard (at number 284 on Side B of tape 4 for February 8, 1996) was as follows:

Q. With respect to the complaint that you raised with Lieutenants Hill and Meloche on the 26th of May, did you make any requests as to whether or not that complaint would be kept confidential?

A. I made sure that -- I asked them to maintain confidentiality. In that type of work environment -- any type of that complaint -- you would be severing a relationship with a lot of people that are not all racists wearing hoods.

Racial harassment is conduct of sufficient import that, in my view, any manager to whom an allegation of its occurrence is made has an obligation to deal with it thoroughly. Indeed, once made, such accusations may take on a life of their own, independent of the accuser. These are not matters normally to be dealt with by putting the parties in a room and trusting that they will shake hands and make up so that everybody can then forget about it and get on with their business. Racist behaviour affects the environment of the workplace for everyone, thereby engaging the public interest, as is implicit in human rights legislation across the land. These managers had a duty to investigate the matter in order either to satisfy themselves that the Complainant's charges were groundless or, if not, at least to take measures to avoid their repetition such as, at a minimum, cautioning the offender. Surely, if the occurrence was deemed of sufficient importance to warrant writing a report about it to the Superintendent, the nature of the allegations that gave rise to it ought to have been specifically drawn to his attention as the Complainant maintains. However, while the Ministry is responsible for this failure of its managers, not having been informed of these allegations the Respondent George Simpson can hardly be faulted for having taken no action at that time.

Mr. Hill recalled under cross-examination that the Complainant approached him and Mr. Meloche the next day, May 27, and asked whether they had breached confidentiality. They said they had not, but that they had overheard Terry Johnson (one of the supervisors) talking about it in the lounge with another corrections officer. The reason for the Complainant's query is made apparent in the following paragraphs of his first complaint:

13. On May 27, 1988, Officer Windebank asked me if I was really Indian and what reservation I belonged to. At this, Frank Geswaldo began to laugh. I asked Officer if he asks all blacks where they come from. I also asked why he was so interested now.
14. I then notified Acting Lt. Hill and Lt. Meloche of what had transpired and asked if the strict confidentiality had been broken, he said it was not from that office but he had heard others talking about this openly in the lounge.

In his testimony the Complainant repeated the substance of these paragraphs. He said that when he asked Mr. Windebank, whom he had known for a number of years, "what sparked the interest all of a sudden" in his ancestry, the answer was that "he was curious". He testified that: "seated just behind him was Mr. Geswaldo, and he took great humour in these questions. He was laughing. Mr. Phil James [who] was present" showed no reaction. It was this incident that led the Complainant to ask Messrs Hill and Meloche whether the promise of confidentiality had been broken.

Mr. Windebank, an articulate witness with a degree in journalism from Ryerson, made a very negative impression on me. The background information elicited from him was not confined to such matters as the length and nature of his employment at the institution and his relevant qualifications. It went well beyond such matters, apparently in order to suggest that he was virtually a "race-relations expert". He said that as an adolescent he had studied North American aboriginal cultures on his own because he thought such people were unfairly treated, and he claimed that, in recognition of his having "exposed some anti-semitic students" he was made an honorary member of a Jewish student group in the United Kingdom where he said he had taken, but not completed, a course in "Law and Social Studies". He went on to say that he had spent over a year in Israel "helping" at the end of the Yom Kippur war before eventually making his way to

Canada where, in due course, he became a corrections officer working at the Centre and was eventually given the opportunity to make a further contribution to the enhancement of race relations.

Mr. Windebank maintained that he was approached by Mr. Paul Mulhern, an Assistant Deputy Superintendent at the Centre, who asked him to do a racial discrimination study because "a group of black officers led by Mr. Mannie Vidal" had put his name forward "as somebody who they considered to be impartial and could impartially report about the feelings and suggestions of the Toronto East Detention Centre about what could be done to improve race relations." This might, perhaps, be taken to suggest the existence of a race relations problem and a lack of trust in management to deal with it impartially; but, be that as it may, Mr. Windebank said he "was quite flattered by that, actually". He said he prepared a report containing a number of suggestions, some of which were his own, and that he recommended the establishment of a race relations committee.

Although Mr. Windebank said that his report was submitted to Mr. Mulhern, no copy of it was filed in these proceedings, nor was any information provided as to when all this occurred. Mr. Vidal's evidence touched upon this matter, and in seeking to discredit that testimony, counsel for the Respondents said (at number 140 of Side B of Tape 2 for October 21, 1997) that:

... you have Mr. Windebank talking about a report he did involving some black officers, and you've heard from Mr. Vidal there was no such thing that occurred. Now you have obviously a contradiction there, or a conflict in the evidence. I'm not sure why Mr. Windebank would make it up. Or what good it would do him in this proceeding. But that's simply what I guess Mr. Vidal said – it's a complete fabrication; he came here to mislead you. I don't think that's the case. You judge the witness. You have that opportunity.

However, contrary to that suggestion, Mr. Vidal confirmed that such a report was at least at one point in progress. He testified that Mr. Windebank called him aside to read him a report, or part of one, which he found "quite frankly, offensive", particularly by its reference to the "ghettoization" of black officers. Mr. Vidal said that there was no coherent group of black

officers of which he was the leader, and he testified to having denied, in answer to a question put to him at one time by Mr. George Simpson, that he was organizing some secret group of black officers who were meeting at his home. Not only had he not put anyone's name forward in relation to any undertaking regarding race relations, but he indicated that if he had had any problems Mr. Windebank, who was simply a line officer of less seniority, would not have been an individual to whom he would have turned.

At one point in his evidence-in-chief Mr. Windebank provided a withering character assessment of the Complainant that was so patently exaggerated that it would have been suspect if delivered by a qualified psychiatrist. When asked how he would describe the Complainant in the years that he knew him he replied as follows (Side A of Tape 5, May 28, beginning at number 239):

... Well, I was never socially involved with Mr. McKinnon. To be very honest, I thought he was a poisonous influence on the working environment. He was disruptive, he was difficult, he was most unpleasant to his co-workers. Many times he would do, he would do, things which were very disruptive in that kind of environment, and I think, I have to stress, I was bothered by this because this was an environment that had the potential for serious repercussions with inmates getting upset and angry and violent and, uh, he was not a team player, he was not -- he didn't work as part of the team. He would not co-operate. He would be very picky about things. He would write people up constantly for what appeared to be in his opinion -- his interpretation of rules and regulations. ... He would fill in these occurrence reports and write, you know, "I was working at such a place and this officer did this contrary to such and such a regulation", even though often the officers, in most people's opinion, were doing a fine job. And he would do this on a regular basis. ... And it was causing a lot of problems with our other officers. I didn't want to be involved in that. I was just avoiding getting written up myself. But I think most of us felt, you know, all you had to do was say "boo" and Mr. McKinnon would write up an occurrence report. ... I got the impression that Mr. McKinnon was involved in a campaign and this was all part of the campaign that he was involved in. ... I don't really know what the campaign was about. I had no idea. But I got the impression he was not happy with many things, and I would assume his behaviour was to bring attention to the things he was unhappy about, I would assume. ... I think Mr. McKinnon's communication skills that I witnessed were more on the level of physical communication, which would be in the form of being physically intimidating towards staff and offenders. Verbally, he would curse to the point of rudeness with staff members and supervisors, and was curt also with offenders. As I said, a difficult person to have to deal with. ... He seemed to be permanently angry. Although there were a few days -- they were memorable because they were unusual -- when he would be for no apparent reason

very happy. But most of the time he seemed to be very, very angry, indeed. And it was quite disturbing to have to see that. ... [he] gave the appearance of barely suppressed violence. There was always that feeling that he would explode into a violent rage. Even though I never actually saw him do that, there was a sense that it was always there. He was quite intimidating I think towards other staff. They felt -- some of them felt quite afraid of him. And he had an air about him of complete contempt for most people he worked with, if not all the people he worked with. Arrogance towards most people he worked with.

Mr. Windebank had by the time of his evidence climbed the ladder of success at the Ministry to the point where, even though he had not been the Complainant's superior at the time of the events at issue, he was questioned as though he had been in a supervisory position at the Centre and privy to a variety of information regarding the Complainant placing him in a position to provide compelling evidence of great cogency. At best, I found his scathing denunciation of the Complainant to be an exercise in overkill based on the dubious observations of one who apparently had had little contact with the Complainant.

Unless he was simply insensitive to them, Mr. Windebank was unaware of the circumstances alleged by the Complainant as lying at the foundation of his human rights complaint; yet, lacking that knowledge, he readily concluded that the alleged victim was the wrongdoer. In portraying the institution as a generally strife-free workplace in which the allegedly arrogant, contemptuous Complainant was the principal instigator of such problems as there may have been, Mr. Windebank ignored the many grievances brought by a host of others, the many other complaints of human rights violations, and the plethora of occurrence reports written by other members of a staff duty-bound to report anything they thought untoward, whether it pertained to safety and security, inmate conduct, staff relations, or other matters. Clearly, a limit cannot be imposed on the number of *reasonable* complaints that a person can file and, if it is suggested that the Complainant was the author of an inordinate number of occurrence reports of a trivial or baseless nature well in excess of the numbers of those generated by his peers (many of which are exhibits in these proceedings), it was open to the Respondents to provide through competent witnesses proof to that effect; and Mr. Windebank's blatant hyperbole does not constitute such proof.

Mr. Windebank's testimony is also inconsistent with the view shared by nearly all the witnesses, including those called by the Respondents, that the Complainant was a quite competent corrections officer. And when confronted with management's appraisal reports evaluating the Complainant, he had to admit that they describe an exemplary officer who got along well with his co-workers and, in the final analysis, with his supervisors as well. His only answer to that written record was to suggest that management regularly gives employees unmerited ratings in order to avoid backlash problems – an answer that is hardly likely to instil confidence in the integrity of the managers of the institution.

Finally, in relation to his description of the Complainant in the years that he had known him, it is to be noted that Mr. Windebank had never been the object of any act of violence or intimidation on the part of the Complainant, nor did he name any other person either witnessed by him, or even rumoured to his knowledge, to have been the object of such conduct at the Complainant's hands.

As to Mr. Windebank's encounter with the Complainant on May 27, 1988, he said that he had been asked to work in the admitting and discharge area with the Complainant because no one else wanted to do so. He portrayed himself as some sort of confidant of management made privy somehow to a host of problems caused in the admitting and discharge area by the ostensibly irritable, intimidating and unpredictable Complainant. Because he was seen to be "a reasonable guy" he was asked by management to go down there to work with their nemesis, to try to "calm things down". And, being "a reasonable guy who likes a challenge", particularly if it relieves the monotony of his mundane work, and one who "doesn't mind setting an example for other people", Mr. Windebank risked becoming another of the Complainant's occurrence report write-up casualties – a risk that he had previously avoided, presumably by having as little to do with the Complainant as possible. Seemingly, it was his mission, confidently entrusted to him by management, to go into the admitting and discharge area to calm things down and work with the irascible Complainant who had been "causing problems" for the staff there.

Although intimating that he had not been apprised of the nature of the problem he was being thrust into the middle of, Mr. Windebank nevertheless had a plan of action. He knew that the Complainant had worn an aboriginal headdress at his wedding reception, and he had "heard" (but *when*, he did not say) that the Complainant might be of native ancestry. Having developed a concern for North American aboriginal peoples as an adolescent, he thought that there might be some common interest that would enable him to reach out to help this "unhappy man" (as he at one point characterized the Complainant). And so it comes to pass that the day after the Complainant had "caused the problems" in the area by accusing Mr. Geswaldo of making a racial slur leading to a hostile meeting at the end of which he was asked whether he was "really a fucking Indian", a situation openly discussed in the lounge by one of the supervisors before this witness's encounter with the Complainant – on that, of all days, Mr. Windebank sits across from the Complainant, asks him whether he really is an aboriginal, inquires as to the Indian band to which he belongs, and then comes to this hearing to wax indignant over the angry reaction thus provoked.

When cross-examined, Mr. Windebank acknowledged that if the Complainant's allegations regarding the previous day's events were true, then his reaction would not have been unusual. Although he was at first insistent that Mr. Geswaldo had not been present on this occasion, a proper reading of his testimony is that he could not recall whether he was. The witness statement prepared for his signature by the human rights investigator (Exhibit 212) indicates that he "did not recall Frank being there, but that he could have been." Mr. Windebank's contention that the investigating officer forced him to sign that statement despite his insistence that it was incorrect from beginning to end, and that she would not even permit him to append a disclaimer, is unworthy of belief. He is a relatively well-educated, forceful and dynamic person of considerable physical presence who could not conceivably be intimidated into signing a document that misrepresented what he had said, even if he were unsure of his right of refusal – and I am satisfied from his own background that he must have been aware that he was not legally bound to endorse a document misrepresenting what he had said. In the end, however, under cross-examination he confirmed the accuracy of the first paragraph of the witness statement and said simply that he could not recollect seeing Mr. Geswaldo on the occasion in question.

Another witness, Mr. Miller, described a clash between the Complainant and Mr. Windebank that, apart from its setting being to his recollection the staff lounge, would appear to be the same incident alluded to by both the Complainant and Mr. Windebank. Mr. Miller, who was not cross-examined on this point, said that when the Complainant came into the lounge: "Tom Windebank turned to him and said, 'Mike, which reservation are you from?' Mike was obviously disgusted and he asked Windebank, 'Do you ask blacks or other people where they come from?' Then Mike turned and left the staff lounge. There was Windebank, and the others there, smiling." (July 3, 1996, Tape 1, Side A at number 337.)

While I would agree with counsel for the Respondents that to ask such questions is not offensive *per se*, the entire context must be borne in mind. The Complainant's testimony in reply regarding this matter was simply to the effect that he had not asked for Mr. Windebank's help or sympathy, and that he found the questioning intrusive – to which I would add that it was also either pretentious and condescending, or mean-spirited, depending on his purpose and the state of his knowledge. The Complainant went on to insist that Mr. Geswaldo had been present and had indeed laughed. Frankly, as between the two versions of the incident, I prefer that of the Complainant to that of Mr. Windebank who I am satisfied told the human rights investigator that he could not recall whether Mr. Geswaldo had been present.

That management would single out Mr. Windebank, who was of the same rank as the Complainant at the time, and send him into the admitting and discharge area as some sort of emissary with the tacit mission of calming down the situation is, at best, fanciful. If, however, as he clearly wanted to convey, he was closely familiar with everything that was going on at the Centre, it would be impossible to believe that Mr. Windebank was unaware of the wide range of "nicknames" by which the Complainant was called. Assuming that he knew of these names, how could a person of his apparent intelligence, graced (as he insinuates) with a deep-seated interest in matters aboriginal and a conviction that native Canadians (at least on occasion) have been unfairly treated – how could such a person not have at least suspected long before this that the Complainant might be a person of native ancestry into whose background it might be rewarding

to inquire, if for no other reason than in the interests of promoting better race relations? One can but ask, along with the Complainant, "What sparked the interest all of a sudden"?

Based on his demeanour, I am convinced that if Mr. Windebank was led to believe that the Complainant was causing difficulties in the admitting and discharge area on account of which he was being assigned to work with him there, he would have made it his business to discover the nature of the difficulty, which clearly it would not have been difficult to do since that problem (accusations that racial slurs had been made) was being openly discussed in the lounge. In my view, it is more probable than not that it was no mere coincidence that Mr. Windebank, whether mischievously or ingenuously, made these inquiries of the Complainant that day in May of 1988, thereby provoking an entirely understandable angry reaction.

Although it is rather lengthy, in view of what I have had to say about this witness I think it necessary to set out Mr. Windebank's testimony relating thereto, beginning with his reply to a question as to how it was that he came to be in the admitting and discharge area nine years previously, almost to the day (Side A of Tape 5 for May 28, 1997, beginning at number 355):

The context was, I was aware of the fact that Mr. McKinnon was writing up his co-workers almost daily, if not by the hour, and many of the co-workers were -- felt most uncomfortable working with him. I was asked to work in admitting and discharge and it was not said to me but I didn't usually work in that area -- to me the implication was "you're a reasonable guy, please go down there and try and work with someone who's being difficult". That was the clear implication. "Try and calm things down. Go down there and just work there because we're having a lot of problems down there with Mr. McKinnon who's causing problems with the others down there."

Q. Were you prepared to do that?

A. Yes, I was.

Q. Well, why? If others were trying to get away from Mr. McKinnon and getting away from admitting and discharge because of his behaviour, why would you be prepared to go in there?

A. Because I was a reasonable guy, and because I don't mind setting examples for other people. I have no problem with that.

Q. Did you feel physically intimidated by Mr. McKinnon?

- A. Not physically, a bit intimidated, but not physically intimidated, but a bit intimidated by his attitude and his unpredictability.
- Q. But that didn't cause you just to say "no", you didn't want to go to A & D?
- A. I like challenges in life, and to me, I mean working in a corrections centre in Toronto can often be a very dull experience, and this struck me as perhaps a challenging encounter.
- Q. So, how did the encounter go? Tell us about it.
- A. Most of the staff appeared to be actively avoiding Mr. McKinnon because he was writing up everybody and openly complaining about people. I made a point of sitting down with him. I remember this quite clearly. It was at a metal desk where inmates are booked in. They have computers there and books there. And I tried to start a conversation with Mr. McKinnon. And I had heard recently about -- that -- that he had worn an aboriginal headdress to his wedding, which I thought was very interesting. And that I heard that he might be of aboriginal ancestry, and I thought that was extremely interesting, and seeing that Mr. McKinnon and I didn't have -- up until that point -- have a lot in common, it was something that we might have a common interest, me being interested in cultures in general. And I asked him -- I asked him if he was of aboriginal descent and I asked him which band he belonged to and he looked most upset when I asked him that question. He certainly didn't answer me in any coherent way. He was -- he appeared to be very angry that I asked him that question. ... My intention was just a light conversation, an introductory conversation in an area of common interest that I thought would be pleasant -- would be pleasant to talk about, and perhaps the way to get the most out of it personally, as it usually is. ... I think he did [ask me why I asked him] ... I've read the statement [in the complaint] and that has kind of refreshed my memory, but ... I do recall his reaction being, in my opinion, completely bizarre ... very hostile, very irrational and from my vantage point I certainly -- it was not a reaction that I was expecting.
- Q. [After drawing paragraph 13 of the complaint to the attention of the witness] At this, he says, "Frank Geswaldo began to laugh."
- A. Frank Ges -- Well, Frank Geswaldo wasn't there, so --
- Q. Absolutely certain?
- A. I remember that -- I remember that day very clearly because I was so shocked by Mr. McKinnon's behaviour, that I -- yes, I do remember who was there and I do not recall -- unless he was hiding under a table or something, he was not there.
- Q. So if the human rights investigator when she interviewed you -- if her -- if she recorded you telling her that Geswaldo was there, she got that wrong? How do we explain that?

- A. Did she record that he was there? Yes, that's absolutely incorrect.
- Q. And how can you be so sure about that?
- A. Because I remember the day very clearly. I remember the supervisor there was a man by the name of Mr. Casey. And he was being very patient and trying to keep things together and there weren't a lot of people down there. We were quiet. The only reason I had an opportunity to talk to Mr. McKinnon was that it was quiet at that point. Most of the inmates were gone, therefore the place was quiet. So it was really he and I, and I think Charlie Casey, and perhaps Phil James was around somewhere. But I do not recall at all Frank Geswaldo being there. That's why I said he wasn't there. I would have remembered that too, I would have remembered if there'd been laughter.

Before leaving this particular matter it should be noted that Mr. James was not questioned regarding the Windebank-McKinnon encounter they both say he witnessed, nor was Mr. Casey called either to substantiate the claim, denied by the Complainant, that he was present as well on that occasion, or to testify as to what he had observed if he was.

The next episode referred to in the Complainant's first complaint involves Mr. James who was not named therein as a Respondent. It is described in paragraph 15 of the complaint as follows:

15. During the week of June 20-24, 1988 I booked an older native Canadian, Mr. Flett, who was intoxicated. Officer Phil James who was talking to the person said that he reminded him of someone when I came around the corner. Officer James said that I am the person who I [sic.] reminded him of. I approached supervisor, Charles Casey, and said that I did not think I should have to put up with this. He said it might look like I am ratting out and I should talk to Phillip myself. I then spoke to officer James and asked if I ever made comments about the other Officers. He said "no", and that I took this stuff pretty seriously. I asked him if he could afford me the same respect I gave him, he agreed, but the atmosphere between us was different from this point onwards.

The Complainant's testimony regarding this incident was in substance the same as this paragraph of his complaint. He said that on the occasion in question he was about to leave the search area when he heard a lot of laughter, that he came back to the area and that Mr. James, who was

speaking to Mr. Flett, an older, intoxicated native inmate, pointed at the Complainant and said, "There's the guy you remind me of." He said both the staff and the inmates were laughing, and that the incident made him furious. He spoke to Mr. Casey who, in effect, advised him simply to settle it himself with Mr. James who, when confronted, agreed to afford the Complainant "mutual respect". Although this event is referred to in the first complaint, Mr. James was not named therein as a Respondent.

The Complainant's account of the incident was corroborated in all material respects by Mr. Welsh who had been working in the area when it occurred, and who said that Mr. James was making fun of an intoxicated old native Canadian who was being searched, asking him if he was related to "Big Canoe" (an obvious reference to the Complainant), and that there was general laughter amongst the correctional officers who were present, but whose names he could not recall. As they were laughing, the witness said, the Complainant walked in and Mr. James told the old inmate that he reminded him of the Complainant. He said that the Complainant seemed "pretty upset" by the occurrence. Messrs Stockwood and Bunting also testified to having heard a comparison being made between the Complainant and a drunken aboriginal inmate, but they were unsure as to who had drawn it. In view of Mr. James's own testimony, however, their uncertainty in this regard is unimportant.

Mr. James's account of this incident is substantially the same as that of Messrs McKinnon and Welsh, but the spin he puts on it is quite different. He began by describing the procedures that are followed in searching inmates: getting them to undress, cataloguing their belongings, examining them for injuries, weapons and other contraband, and so forth. While unable to recall the date that it happened, he confirmed that he had indeed conducted the search of Mr. Flett on the occasion in question, and he said (beginning at number 270 of Side A of Tape 1 for December 4, 1996) that Mr. Flett:

... was stinking of the odour of an alcohol beverage that he had consumed, and he was unsteady on his feet, and he appeared to be drunk. He was fairly pleasant at the time. I've found through my experiences that some people, when they're drunk, they become very vicious. So if you keep them pleasant, it's usually a lot easier to deal with them than if you are authoritarian and give them an excuse to get mad at you for something. With this fellow -- I was kidding around with him.

So he told me his name -- he could hardly stand up -- I said, "No, what's your real name?" "Whadda yuh mean?" [It may be noted that the entire dialogue ascribed to Mr. Flett was delivered with a slur intended to reflect his drunken condition.] I says, "That's your white man's name. What's your real name?" And he said, "My name is 'Crazy Horse'." And he laughed. And I laughed. And I said, "Well you know, you have to take your clothes off", and blah, blah, blah. "Oh, yah, yah". And so he did that, and the conversation went on. At this point in time, with this conversation, there was scuttlebutt, rumour, gaol talk, whatever, from, just, the general correctional officers, that Mr. McKinnon had some case against Mr. Geswaldo, and there was an exchange, and he's gonna charge him with discrimination or whatever, and he's gonna get him fired, and all of this stuff. I thought it was a joke, and just another one of the rumours that were going around the institution. So I just carried on. I said to him. "Oh, yah, we have another guy around here who says he's an Indian." He says, "Oh, yah?" I says, "Yah, they call him 'Runnin Bear'." Meanwhile, I'm searching this guy, taking off his coat and stuff, and he says "Oh yah, another one, eh?" So we did that. Then, while we're doing this, I'm being pleasant with the fella, he's happy, Mr. McKinnon came down. At that point, in my mind I saw Mr. McKinnon as a normal white person. [Like Mr. James, who is of black Jamaican descent, Mr. McKinnon's racial heritage is not readily discernible.] So I said, "Ah, there he is now." At which time the Indian incarcerate, I looked at him and he said, "He's no fuckin Indian. Awh, you're kiddin' me, you're puttin' me on." And I said, "Well, you know, if you don't believe me, that's okay." We dressed the fellow, and I passed him through to the other area where he would be issued his institutional clothes, and stuff like that. The demeanour, the way this fellow was acting was amusing, he was drunk, it was pleasant, we were having fun together. This Indian, this aboriginal inmate, did not sense any negatives from me, nor did I mean any. I just was trying to get him searched .. without the use of any force or restraints, which I did. ... Years before, when I was a policeman, I was told by my staff sergeant at the desk to go and sit in a room and give cover for another officer who was booking in another Canadian aboriginal who was drunk. I looked in the room and I thought, "They're putting me on." So I went back to the sergeant and I said, "Sarge, I'm sure the officers can take care of this guy." And he said, "Trust me. Just do what I tell you and go in there. I want you in there in case this guy goes crazy." Okay. So I went in there. During booking him in the officer says, "What're you doing in here?" I said, "The staff sent me in." So I sat. The fellow was quite calm, pleasant -- he actually started to cry a bit. I stood near him. He held his head down beside me, and he was drunk, and he's crying a little, and then all of a sudden he went "wham" [said with an accompanying yelling sound] and punched the wall. And I said, "Holey smokes". It took five of us to restrain this fellow who was a skinny little guy, intoxicated. It ended up when we walked out of the room two other policeman had put handcuffs on another policeman while trying to restrain this fellow who at first I thought was just a little drunken aboriginal. So I learned a long time ago, there's potential there. You have somebody who's drunk and they go crazy on yah. That was my experience with a Canadian aboriginal drunk and him losing control and going crazy. So that

experience prompted me with this other Canadian aboriginal intoxicated, drunk, whatever -- to try to treat him pleasantly so we could keep it pleasant, which I did. It was unfortunate that Mr. McKinnon took offence to me referencing him. At that time I was not aware of his status.

I have no doubt about the general accuracy of Mr. James's testimony regarding this event, coinciding as it does with that of the other witnesses. However, taken together with his explanation for his conduct, what it reveals about this Respondent is rather telling. On the basis of one alleged prior experience some years previously with an intoxicated person of aboriginal heritage whose diminutive physical stature apparently concealed astonishing strength, when confronted once again with "a drunken Indian", although this time an "older", falling-down, slurred-of-speech, drunk being strip-searched in front of a group of officers, Mr. James decided that in the interests of safety he should defuse this potentially hazardous situation by psychological means. He wanted to disarm the "old fellow" with pleasantries, he tells us; and what better way to do this than to engage him in friendly banter focussed on his race, much to the amusement of some colleagues? To that end, he suggested to this unfortunate old inmate of "amusing demeanour" that he was not entitled to a "white man's" name like "Flett", inquired as to his "real name", and shared with him the ostensibly soothing information that the institution has a rumoured-to-be, or "wannabe", Indian of its own named "Running Bear" (a.k.a. "Big Canoe"), to whom it is wondered whether he might be related. It was pleasant. It was fun. There was nothing negative on either side. Of course, whether Mr. Flett was too drunk to take offence, or too intimidated to protest against this affront to human dignity, and whether the safety of Mr. James and his fellow officers necessitated the inclusion of the Complainant as an object of his ridicule, are beside the point. He did his job. He got this drunken old Indian safely over to the adjoining area to be dressed and led away in prison garb, and no one got hurt in the process.

Mr. James's story reveals more than simply his insensitivity. It belies as well his assertion that he did not know of the Complainant's native heritage. The evidence indicates that the Complainant approached the Commission shortly after his encounter with Mr. Windebank, and that a Human Rights Officer then contacted Mr. Geswaldo prior to the Flett incident by which time, by Mr. James's own account, there was at the very least a strong rumour in the Centre to the effect that "Mr. McKinnon had some case against Mr. Geswaldo [and that he was going] to charge him with

discrimination or whatever ... and he's gonna get him fired, and all of this stuff". As has already been noted, Mr. James was present on May 27 when to the amusement of others Mr. Windebank queried the Complainant about his native ancestry; and when, along with this, we consider his having predicated the nickname "Running Bear" of this "guy around here who says he's an Indian", the only reasonable conclusions are that Mr. James knew that the Complainant was, or might very well be, a person of native Canadian descent, that he was aware of the general nature of the charge of discrimination "rumoured" to have been made, and that with callous and reckless indifference to what he knew or strongly suspected, he pointed at the Complainant while saying to the hapless old inmate, "There's the guy you remind me of."

Although it was on or about June 8, 1988, that the Human Rights investigator contacted Mr. Geswaldo, it was not until the end of November of that year that the formal complaint was signed and served. The Complainant testified that during this period he was subjected to recurrent annoyances that happened only when Mr. Geswaldo, by whom he said he was being "targeted", was working. Asked what he meant by such "targeting", he said:

Again with the computers [being turned off], changing my assignment at the last second, making sure that I stayed right to the end of my shift where other staff would be -- he might give fifteen, twenty minutes, grace, I stayed right to the end of my shift with him. I remember quite a few times the phone would ring and there'd be nobody at the other end, and Frank would always say, "Is your phone working?"

The Complainant testified that an assignment to the admitting and discharge area is considered "a perk position", explaining (Tape 3, Side A, February 8, 1986, at number 217) that:

As a correctional officer with years of experience, working the ranges you become -- it becomes rather mundane, but working in A & D it's different each day. Different clientele coming through, might be different papers coming through, a longer break, longer lunches, there's no night shifts, few weekends, come and go as you please, access to a phone if you have any personal business, frig, coffee machine. Again, we don't have those things upstairs on the floor. A radio, an air purifier for people that, uh, are willing to smoke.

The Complainant continued to work in the admitting and discharge area until mid-September when he was removed from that preferred location following a meeting with the Respondent, Jim

Hume, that was preceded by a meeting with the head of security. These meetings are described in paragraphs 16 to 18 of the first complaint as follows:

16. On September 13, 1988, Mr. Brown, the head of security, asked me to come to his office. He asked me what could be done to improve the situation in my area. I told him of the problems with Frank Geswaldo. Mr. Brown then stated that no one should have to put up with such treatment.
17. Mr. Brown then asked me to meet with Mr. George Simpson, Superintendent, and three other supervisors. I refused as this would compromise my position.
18. On September 18, 1988, I was called to a meeting with Mr. Jim Hume, Deputy Supervisor. I asked for Union Representation but this was denied on the basis of Section 18 CWCBA. This states that if such a meeting is not disciplinary, then Union Representation can be denied. Mr. Hume said I was going to be removed from the Admitting and Release area. He then asked me what happened on September 12, 1988. I asked Mr. Hume to see the accusations and he refused saying that the investigation was to be carried out by a senior official.

The Complainant's evidence regarding the meeting with Mr. Hume, and what had led up to it, began with an account of a clerical error made by him in the processing of documents in the admitting and discharge area on September 12, 1988, involving a mix up of the papers of protective custody inmates and regular inmates. He said that Mr. Geswaldo had pointedly criticized him for this in front of other staff members and inmates, and that when (without, he said, raising his voice or exhibiting disrespect) he asked why he was being treated this way in front of the others he was told, "If you have a problem with it, take it up front" to the superintendent. (It is to be noted that no evidence of the particulars of any "altercation" was forthcoming.) Mr. Geswaldo later informed him that the "I.C.'s" office wanted a report from him which the Complainant in due course submitted. The Complainant said that when Mr. Geswaldo was berating him for his error, Mr. John Dobson observed that he (Mr. Dobson) had done the same thing the day before. As to his perception regarding the frequency with which such errors occurred, the Complainant and his counsel had the following exchange (Tape 4, Side A, February 8, 1996, at number 140):

Q. From your experience working in admitting and discharge, was this an unusual error?

A. No. There was errors every single day in the admitting and discharge area. So much so, that they had to put another supervisor down there to try and correct it. It is usually a two-supervisor position. They installed a third supervisor. And there was computer documentation sent back that we had to update each day for records.

Q. From your experience, how did Mr. Geswaldo's reaction to your error on September 12 compare to the usual reaction of Mr. Geswaldo or other supervisors to errors which occurred.

A. He over-reacted.

The Complainant was then summoned to a meeting with Mr. Hume on the 15th of September at which he was informed by management of its decision to remove him from the admitting and discharge area – a decision of which he said he had already been made aware by James Duncan and Sharon Johnson, the president of their local, who had told him that everyone was talking about it. While he had the impression that Mr. Dvorak was present when he met with Mr. Hume, the Complainant said that Mr. Derek Miller, whom he had brought along as his union representative, was not allowed to remain. Asked what happened at the meeting he said:

It was more or less a kangaroo court. They had made up their minds that I was going to be removed no matter what I said. They had already made up their minds. And he held true to his word. He said that I wouldn't get back in A & D as long as he was in the Toronto East. And I never did get back in.

As to the earlier meeting, the Complainant said he did not know why he was called into the office of Mr. Charles Brown, the head of security, on September 13, 1988, other than to be asked what could be done to improve things in the admitting and discharge area. He repeated in his testimony that, when told of the problems with Mr. Geswaldo, Mr. Brown indicated that "nobody has to put up with that". According to the Complainant, Mr. Brown went on to say that he had been told that "they want to know if [you] want to come out of A & D". The Complainant said he told Mr. Brown that he found it ironic, "that *I'm* voicing concerns, and *you're* asking *me* if *I* want to come out?" By "they", I took the Complainant to be referring to managers more senior than the head of security. However, the reason given in paragraph 17 for his refusal to accept Mr. Brown's offer to arrange a meeting seems to render this aspect of the complaint disingenuous, and in that

regard counsel for the Respondents pointed out in argument (October 21, 1997, Tape 2, Side B, number 85) that when Mr. Brown:

... speaks to Mr. McKinnon, he becomes aware of Mr. McKinnon's dissatisfaction -- he's advised there's a slur or slurs, however you characterize it -- and recommends to him that, why don't we see the superintendent along with three supervisors. Not an unreasonable suggestion under the circumstances. Bring the matter to the fore and deal with it. Mr. McKinnon says, "No, it would compromise my position." What does that mean, with respect: "it would compromise my position." Avenue available; not pursued. No reason other than it would compromise his position. Not a reasonable approach. But the agenda was already there, with respect.

While paragraph 17 of the complaint read out of context might invite that interpretation, what is overlooked is that, although the complaint had not been formally signed, the very matters of which the Complainant had advised Mr. Brown were under investigation by the Commission whose intervention regarding the possible infringement of his human rights he was entitled to seek. He was entitled as well to whatever remedies that process might lead to. He had no legal, moral or practical obligation to jeopardize the ongoing investigation and vindication of his rights that he was thereby seeking by accepting an offer of a meeting about the outcome of which he had by then every reason to be misapprehensive and distrustful. In my opinion, there is nothing unreasonable in his rejection of that offer on the ground that it might "compromise his position". Obviously, he had an agenda, but not in any pejorative sense since, unless there is something wrong in invoking the protection of the *Code*, it was an entirely legitimate agenda. The veiled suggestion to the contrary seems to be part of the Respondents' attempt to depict the Complainant as a hypocritical bully, insincerely and improperly motivated in his pursuit of his human rights complaints.

Mr. Dobson, whose testimony I accept without reservation, indicated that although errors in the admitting and discharge area resulting in protective custody inmates being placed in the bull pen with regular inmates are not frequently made, they do occur. He said that since the documentary procedures were changed "two or three years ago" (*i.e.*, long after the event in question), the incidence of such occurrences has been greatly reduced. He recalled the Complainant's having

been removed from admitting and discharge a short time after making such an error, and he went on to say (towards the start of Side A of Tape 1, for July 18, 1996) that:

I have to assume that that's why he was removed. All I can say is that he was removed after that occurrence. I can say that I have on occasion inadvertently put a protective custody inmate into the large bull pen by mistake and I have not been removed. Other officers have done the same thing. They have not been removed. But again, I can't say that's why he was removed. ...

Q. On the occasions that you have made these errors, has there been any kind of discipline, reprimand of you?

A. No. ...

Q. You were asked some questions, Mr. Dobson, about whether you thought it would be reasonable for a supervisor to speak to Mr. McKinnon, or another officer, if this kind of error was made in admitting and discharge [to which the witness had replied in the affirmative]. On occasions when you've made an error in terms of putting a P.C. inmate in the general bull pen, has your supervisor spoken to you about the error?

A. Not all the time, no.

Mr. Hume, whose career in the Ministry began in 1966, came to the Centre in 1987 to fill the position of Senior Assistant Superintendent of Services, remaining there until June of 1990 when he was appointed Superintendent of the Owen Sound Gaol. As to the extent of his contact with, or awareness of, Mr. McKinnon prior to mid-September of 1988, Mr. Hume said that he could not "really single him out" from the rest of the staff although "for the most part, after a year and a half, I probably knew -- I could put a name to any of the faces" of the one hundred and twenty or so staff members. Mr. Hume's professed lack of knowledge of the Complainant before the September incident that admittedly brought him to his attention is inconsistent with Mr. Poynter's testimony and at odds with that of Mr. Windebank.

The evidence of Mr. Poynter, who spoke in glowing terms of the efficient senior management team of which Mr. Hume was a member, was to the effect that the problems in the admitting and discharge area and their possible link to the Complainant's heritage were raised before them in or around April of 1988, well before the Hume-McKinnon meeting. Indeed, the situation was sufficiently serious by mid-June as to cause Mr. Poynter to request from Mr. Hill an addendum

(Exhibit 124) to his earlier report (Exhibit 123). While the terms of that request, whether it was oral or written, and what triggered it, were not matters of evidence in these proceedings, it elicited a reference in the addendum to racial slurs and the use of the expression "pow wow" – about which, of course, neither he nor Mr. Hume appear to have done anything. Clearly, then, the Deputy Superintendent was well aware of these matters long before the Complainant's September 15 encounter with Mr. Hume who, I am driven to believe, must have known of them as well.

To hear Mr. Windebank tell it, by the end of May the Complainant was already a notorious trouble-maker, dashing off meretricious occurrence reports daily, if not by the hour, and causing such problems in the admitting and discharge area as to lead to that witness's secondment as a trouble-shooter *par excellence*. Whereas I do not accept Mr. Windebank's assertion that the Complainant was the perpetrator rather than the victim of the incidents in question, it is clear that, regardless of the issue of blame, management could not help but consider such incidents to be "problems", and it is inconceivable to me that the Senior Assistant Superintendent of Services would not have been aware of them. Mr. Hume was in the direct chain of command over the Complainant, and dealing with problems in the admitting and discharge area was not foreign to him, as witness his intervention in the September 12 incident. And, of course, that incident was brought to his attention by none other than Mr. Geswaldo who had been involved in the earlier episodes that led to the May 26 "meeting" arranged by Lieutenants Hill and Meloche whose report was sent to the Superintendent who appears to have met regularly with his management "team" of which Mr. Hume was a member. This is the same Mr. Geswaldo who by early June was being interviewed by the Commission in relation to a charge of racial discrimination and harassment, a fact (according to Mr. James's evidence) that was widely "rumoured", if not clearly known, throughout the institution by the time of the "Flett" incident sometime in the week of June 20 to 24.

It seems clear to me that management was aware of the conflict between him and Mr. Geswaldo well before the Complainant committed a not uncommon error of a kind that had never led to anyone else's removal from the admitting and discharge area. While the clear and serious danger involved in placing protective custody inmates in a bull pen with regular inmates was touted by

the Respondents as justification for the Complainant's removal, such mistakes occur; and since the Respondents, who had ready access to all of the records, failed to cite any other such mistake that was dealt with by the removal from the area of the person responsible, I have no doubt that the Complainant was singled out for this differential treatment. The letter from Mr. Hume confirming his removal, dated September 16, 1988, and entered by the Complainant as Exhibit 16, is as follows:

This letter will confirm our meeting of September 15, 1988 held in my office. The purpose of the meeting was to discuss with you, reports alleging firstly that you had erred in the processing of inmate documents during the execution of your assigned duties in the Admitting and Discharge area of this institution, and secondly that you had conducted yourself inappropriately in the presence of other staff and inmates.

In your defence, you admitted that you have made some mistakes during your tenure in the Admitting and Discharge area, but feel also that you were lacking the proper training in some cases. You referred to the verbal altercation which took place on September 12, 1988 between you and another staff member as merely a discussion which you perceived had been blown out of proportion.

I indicated during our meeting that I was not totally satisfied that you had not been given sufficient time to be familiarized and acquire all the necessary skills associated with the day to day operations of the Admitting and Discharge area. I also advised you that as a result of the findings of the investigation into the matter of your conduct on September 12, 1988 in the Admitting and Discharge area, you are hereby formally counselled in this regard and will be reassigned to the General Duty Correctional Officer Schedule for an indefinite period of time.

You will commence your duties on the General Duty Schedule in Slot #15 on September 29, 1988. Until that time, you will remain in your present timetable but will not be assigned to the Admitting and Discharge area.

Should you have any questions regarding your schedule or assigned duties, please contact Mr. D. Ogilvie, A/O.M.14 - Scheduling Officer.

This letter should not be construed as a form of discipline.

Although this letter purports to be a recapitulation of his previous day's meeting with the Complainant, obviously it can at most reflect Mr. Hume's view of that encounter. However, in my opinion, it is a carefully crafted document that is meant to do one thing while implying another. Indeed, after he was questioned by counsel about that letter, I asked the Complainant

what being "formally counselled" meant, and how it was that such "counselling" would not amount to a "form of discipline". He had no idea, and he said I would have to ask its author. When for the purposes of giving evidence, Mr. Hume, who is one of the Respondents, made his only appearance at these proceedings, alerted to my concern counsel for the Respondents questioned him about this. His testimony in this regard (beginning at number 142, Side A of Tape 1 for February 26, 1997) is as follows:

Q. Now, in the second sentence of that third paragraph there's a reference to the findings of the investigation into the matter. Do you know whether you undertook the investigation or would you -- could you assist us as to whether somebody else might have done it?

A. I really can't recall.

Q. All right. You go on in that sentence to indicate that, I'm quoting here: "You are hereby formally counselled in this regard and will be reassigned." Ah, what did you mean by "formally counselled"? How do you -- those are your words, I obviously --

A. Well, "formal" simply means it becomes a matter of writing. So, it's written. To be "counselled" simply means you've been told. Let's hope it doesn't happen again. You know, "this is the way you did it, this is the way it should be done, we expect you to do it that way." That's it. Generally, the person acknowledges, and you have their assurance at that point in time that that's -- they understood.

Q. And, ah, I note the last line of that letter: "This letter should not be construed as a form of discipline". Was it your intent that it form any part of a record? I point out to you at the bottom that a copy went to the superintendent and also to personnel.

A. Yah, yah, that's ah, that's ah, standard. Superintendent is always advised. I mean, as I said to you before, the "formal" simply means it's now a writing. It goes on a person's file. But to become a record in any other regard, no. That's it, it stops right there. Otherwise, it would be a reprimand, not a counsel. I guess the rationale for saying "formal" and "a counsel", if a person ever came back and we said, "But we've talked to you about this before", and if the person arguing says, "No, you haven't", then we can pull this out and say, "Yes. we have. There it is." That's as far as it goes. I mean the intent of putting this letter should not be construed as a form of discipline. ...

Q. If we move Mr. McKinnon from the A & D to the duties that are set out there, general duties schedule, would it -- is it reasonable to conclude that some discipline is being effected because he's being moved out of A & D?

- A. No, not in my opinion it isn't. Assignments are often changed.
- Q. Can you recall in this particular case what it might have been that convinced you that it was necessary to move Mr. McKinnon?
- A. Well, that he obviously is conducting himself inappropriately, I take it -- it says here in the second paragraph "in your defence you admitted that you have made some mistakes during your tenure in the Admitting and Discharge area and feel that you were lacking proper training in some cases."

The stated purpose of the meeting was to discuss allegations of mistakes and inappropriate behaviour on the Complainant's part, and the plain implication of the letter is that Mr. McKinnon's incompetence and the impropriety of his conduct in engaging another staff member (obviously, Mr. Geswaldo) in a verbal altercation had been confirmed by an investigation of sorts, but one of which no report was produced, written or otherwise. Mr. Hume cannot recall whether it was he or someone else who conducted the investigation; he cannot recall who the other staff member was, but conceded it may have been Mr. Geswaldo; he cannot recall what it was that convinced him of the need to remove the Complainant from the area, but can only assume that it was because of unspecified mistakes and misbehaviour alluded to in his letter of which no particulars can now be furnished. The implication of this testimony is that, while he cannot recall why he wrote the letter, it would not have been written without just cause, and that, even though that is the very issue to be decided, I am to take his word in that regard.

The inability of disinterested witnesses to recall events that occurred nine years previously is understandable; but I find it unbelievable that a person served with a legal process charging him *six weeks after the event* with racial discrimination and harassment arising out of an occurrence adequately described in the formal complaint and readily identifiable would not *at that time* have recalled the event, reviewed the dossier, and initiated a written record to be used in defence of his conduct. Only the most cavalier disregard of such serious charges could explain the failure of a senior manager to take such elementary steps of enlightened self-interest; and for him to come before this Board and profess such a memory loss and the absence of any means to jog it is simply too convenient to be acceptable.

The possible outcomes of a meeting in which, as his letter indicates, accusations are made and matters of "defense" may be raised are either exoneration, with or without apology, or censure, with or without penalty. What Mr. Hume said he meant by the words "formally counselled" is "you have been told in writing; do not do it again". However, the exclusively I-told-you-so purpose which he attempts to bestow upon his communicate obviously does not require the use of the statement "you are hereby formally counselled" – unless, of course, only letters with that formula are kept on file. Surely, the absence of that set of words would not be a barrier to the retrieval of such a letter in order to settle an argument as to whether a matter had been discussed previously.

In my opinion, Mr. Hume's explanation is fatuous. His letter unquestionably amounts to a form of censure which, as he acknowledged, "goes on a person's file." His disclaimer that it does not "become a record in any other regard [but] stops right there; otherwise, it would be a reprimand, not a counsel" was added because, if seen as a reprimand, it would be contrary to his stipulation that it not be construed as a form of discipline. What this ignores is that the Complainant's file may be examined for future purposes and the career-harming censure discovered, that a separate copy is sent to the superintendent upon whose mind an indelible impression may be made, and that working in admitting and discharge is, as others also attested, a coveted assignment his removal from which was clearly the loss of an advantage to the Complainant in consequence of a censure. Mr. Hume appears to be suggesting that, despite all this, his letter cannot be regarded as a form of discipline simply because, as the Senior Assistant Supervisor of Services, he had said so.

I found Mr. Hume less than forthright in his testimony and, based on a balance of probabilities, from the totality of the evidence the inferences that I would draw as to what occurred in mid-September of 1988 lead me to a number of conclusions, the first of which is that there was no "altercation" of any consequence worthy of Mr. Hume's intervention regarding the Complainant's having voiced his displeasure at being publicly upbraided by the acting supervisor who had it in for him, as the evidence reviewed so far makes plain. Nothing suggesting inappropriate behaviour by the Complainant on the occasion in question was filed in these proceedings, such as occurrence reports or "findings of the investigation into the matter", as surely would have been the case had any such documentation existed. In my opinion, the most reasonable inferences to be drawn are

that Mr. Geswaldo, for the same reasons that motivated his earlier conduct, seized upon an admitted error in order to publicly rebuke the Complainant in circumstances in which others were not so dealt with, and that Mr. Hume recklessly, if not maliciously, blamed the Complainant for conduct which was innocent on his part, but not on the part of his antagonist.

We are left, then, with the "mistakes" referred to in Mr. Hume's letter, "mistakes" consisting of a single error which the Complainant readily admitted having made. And what is the nature of that single mistake? It is an error of a kind similarly caused by others on various occasions, but never before (nor apparently since) having resulted in anyone's removal from the area.

Management was aware of the ongoing conflict between the Complainant and Mr. Geswaldo, including the accusations of human rights violations levelled by the one against the other. Mr. Brown was not called upon to refute the assertion that he had indicated to the Complainant on September 13 that management wanted to find out through him if the Complainant "wanted to come out of A & D", and this makes evident that it was management's goal to separate these antagonists – a goal both understandable and appropriate in the circumstances. However, the end did not justify the means. The "information" brought to Mr. Hume by Mr. Geswaldo on September 12 provided the opportunity to effect that separation and, after first pausing on September 13 to see if doing so could be avoided through the Complainant withdrawing on his own, these accusations were acted upon without a proper investigation.

Having discovered through Mr. Brown that the Complainant would not volunteer to leave the area, management intervened in a human rights dispute; and it did so not by trying impartially to get to the bottom of it, nor even by taking the neutral stance of arranging that Mr. Geswaldo would not supervise him (an accommodation subsequently effected, as will be seen), but rather by seizing on a pretext in order to remove the Complainant. As the fact of its having been leaked in advance reveals, the decision that the Complainant was to be removed from the area was made before the matter was even discussed with him, and he was summoned to a meeting on September 15 which was a mere charade. The next day a letter designed to be as grievance-proof as possible was sent to the Complainant, its purpose being, in my view, to provide for the record some

justification for the Complainant's removal from the area but, it must have been hoped, without raising union hackles through the overt imposition of some form of discipline.

Although it occurred after the first complaint had been filed, because it relates to credibility it is appropriate at this point to deal with an incident regarding which we have the testimony of both Ms Shaw-McKinnon and Mr. Johnson, and which was the subject of a letter written to her by Mr. Simpson on June 27, 1989. By way of preface it may be observed that, prior to the Complainant's having replaced his go-with-the-flow reaction to perceived racist behaviour with a disputatious attitude, his wife had enjoyed a fair degree of success by way of special and acting assignments, as can be seen from Exhibits 69 and 70. However, such progress came to an abrupt end when her husband began to complain about the treatment he was receiving. In any case, on or around the beginning of June of 1989, Mr. Johnson informed her that Mr. Hume had said some months previously in the presence of a Mr. Ogilvie words to the effect that she would get no where as long as he had anything to do with it. Ms Shaw-McKinnon brought this to the attention of Mr. Simpson and in due course received the June 27 letter (Exhibit 72), which reads as follows:

Dear Ms McKinnon-Shaw (*sic*):

Re: Remarks allegedly made by Mr. J. Hume, Senior Assistant Superintendent

On June 1, 1989 you advised me that you had been informed by Mr. T. Johnson, Correctional Officer 3, that he had heard Mr. Hume make a remark some months ago, to the effect that;

"As long as I have anything to do with it, Mrs. Shaw-McKinnon won't get anything".

You further stated that this remark was made in the Shift Supervisors office, in the presence of Mr. W. Ogilvie, Correctional Officer 3 and that it was made in reference to your potential for promotion and future consideration for same.

I indicated to you at that time that I had difficulty in believing Mr. Hume would make such a statement, particularly as you had just recently been offered on (*sic*) Acting assignment as a OM 14 Manager. I explained that such appointments were discussed, by the Senior Management Committee and that there had been unanimous consensus that you be offered the assignment. However, I agreed to look into the matter.

Having received reports from all the principals, I asked you to attend at my office on Monday, June 26, 1989 to discuss the findings. Also present was Mr. Hume.

At that time, I told you that Mr. Hume had denied making any such statement and that Mr. Ogilvie had no recollection of having heard Mr. Hume or anyone else, make such a statement. For these reasons I informed you that I would not be pursuing the matter any further. I also advised you that I had asked Mr. Hume to be present at this meeting in order that he inform you directly that he had not made the statement alleged. This he did.

The "reports from all the principals" that were considered by Mr. Simpson consisted of Mr. Hume's denial, Mr. Ogilvie's alleged inability to recollect the incident and Mr. Johnson's confirmation that the comment had in substance been made. (See Exhibit 76 in which Mr. Johnson reported having heard Mr. Hume say that Ms Shaw-McKinnon "would not receive any type of promotion as long as he could stop it".) While Mr. Hume's self-interest provided ample reason for his denial, Mr. Johnson had no apparent reason to make up such a story and, although he could not recall much about the incident when testifying some seven years later, he confirmed that the report marked Exhibit 76 expressed his recollection at the time it was written by him. Mr. Ogilvie, of course, did not testify at these proceedings. In the circumstances, I have concluded that Mr. Hume expressed such a sentiment regarding Ms Shaw-McKinnon, and that he most probably did so because she was the Complainant's spouse. For reasons that will be fully elaborated upon when that incident is reached in the chronology of events, I believe that Mr. Hume's sentiments were shared by Mr. Simpson whose later banishment of the Complainant for an indefinite period of time to a universally disliked posting was a form of reprisal.

My review of the Hume-McKinnon encounter indicates that the Complainant was treated differently from others similarly situated, that such treatment was unfair, and that it was an intervention intended to vindicate, or otherwise advantage, Mr. Geswaldo against whom the Complainant was known to have made charges of racist behaviour that were being investigated by Human Rights Officers. While there is no direct evidence that this was an incident of discrimination on a *Code*-prohibited basis, such appears to me to be the proper inference since it was Mr. Hume's position that he had done nothing wrong and no other motive consistent with

the facts was suggested by the Respondents to explain what I have found to have been wrongful behaviour.

4. The Second Complaint

The Complainant's second human rights complaint begins with a reference to the first and then moves on to a general allegation of continued harassment and discrimination which is followed by a summary of the circumstances of the first alleged instance of such wrongful treatment. These paragraphs are as follows:

2. Since filing the complaint, I have been the subject of a campaign of harassment by the above-named Respondents. I have been singled out for discriminatory treatment, particularly by the individual Respondents, and have been denied opportunities for advancement, as detailed below.
3. In March, 1989, I and my wife, Vicki Shaw-McKinnon, who is also employed as a correctional officer at the Toronto East Correctional Centre, applied for the position of OM14, an entry-level management position. Vacancies for thirteen (13) OM14 positions were posted; twenty-two (22) Correctional Officers (CO's) applied. Both my wife and I were interviewed for the position.
4. A few days after the interviews were held, my wife and I were informed that we had not been successful in the competition by Deputy Superintendent Paul Mulhern. I inquired of Mr. Mulhern, and of each of the members of the interview panel, as to the reasons for the decision, on a number of occasions over a period of several months. They refused to tell me why I was not successful, what my score had been and how I had ranked on the interview.
5. During one meeting with Jim Morris, the Area Personnel Administrator, he told me that I was "management material".
6. Eventually, during a meeting with Jim Morris, I was shown scoring sheets allegedly completed by the interviewers. These sheets were filled out in pen, and each of the scores were identical between interviewers. None of the interviewers used a pen at the interview. I believe the marks on these sheets were contrived by the markers after the interview was held.
7. During the meeting I again asked Jim Morris why I was not successful, and he told me that the decision was that of Supt. George Simpson. He said "Simpson doesn't want you", and added "say you had a human rights complaint ... you wouldn't get anywhere until it was dealt with ... it should

be obvious to you that he is not going to advance anyone who has a complaint."

8. I was later told by other correctional officers that they were encouraged to compete in the competition for OM14, and told that all they had to do to get the job was to sign up.

The most detailed description of the competition in question was provided by Mr. Morris, a "Human Resources Consultant" reporting at the time directly to the Area or Regional Personnel Administrator of the Ministry of Correctional Services, Metro Region, who in turn reported to the Regional Director, as did the Superintendent of the Centre. Mr. Morris said that he had responsibility for the Toronto East, Toronto West, and Mimico Detention Centres, the Toronto Gaol, and eight probation and parole offices, these being the institutions associated with the Don Valley District out of which regional office he operated.

Mr. Morris explained that, although the OM14 position was designed to replace the CO3 position, because it entailed more responsibilities and higher pay, incumbent CO3's were required to compete along with CO2's who were also eligible to enter the competition. The Complainant and his wife, as well as Messrs Geswaldo and James, were among the seven CO2's competing for one of the thirteen OM14 positions that had been established. Mr. Morris was instrumental in setting up the competition and also played a part in the assessment of the candidates.

Unfortunately, the "competition file" that was to be kept by Mr. Morris's regional office disappeared in circumstances about which he could only speculate, with the result that the best source of general information about the competition and, more important, the actual results of the candidates along with the notes made during the interview portion of the contest, was simply not available. When that file, which Mr. Morris said was about six inches thick, was in the possession of the Human Rights investigator, Ms Lolita Phillips, she made notes regarding some aspects of it, which were eventually admitted as Exhibits 188, 189A and 189B. Mr. Morris testified that when the investigator who replaced Ms Phillips some time later requested to see the file he was unable to find it, and that he contacted the Centre whose Superintendent informed him that it had been returned to the regional office. Although he could not know whether in fact the file had been returned, Mr. Morris speculated that there may have been some clerical failure in the regional

office to flag that file and that this might have resulted in its having been shredded with other documents in accordance with the normal "retention" schedule. The evidence does not establish that the file was in fact forwarded to the regional office, or whether instead it disappeared while still in the control of the Centre's staff either during or after Mr. Simpson's tenure as Superintendent. Clearly, however, the responsibility for the loss of that file and any information it contained that might have been vital to the case of the Commission and the Complainant does not lie with them, but with the Ministry.

Mr. Morris said that the competition, which bore the reference "Competition CI-1025-89", was a "comprehensive process" consisting of a written exercise, an oral interview, and the review of records relating to previous performance and attendance. He said that the written part of the competition was conducted in the gymnasium at the Centre, and that he was present at least at its start. To the best of his recollection there were eighteen candidates supervised by two persons, two of the original applicants having been screened out of the competition, and another two having dropped out.

Mr. Morris identified several documents bearing the inscription "Competition CI-1025-89", and these were entered as Exhibit 166. The first of them was an instruction sheet relating to the written portion of the competition. The second was a form on which to enter a candidate's name and total up the scores accorded to him or her in each of the following categories, the maximum points for which are shown parenthetically: A. Education/Development (30); B. Experience (30); C. Knowledge (75); D. Supervisory/Interpersonal Skills (105); E. Communication Skills (30); F. Attendance (40); G. Performance Review (40); Total (350). The third part of the exhibit consisted of four sheets setting out fifteen questions with values ranging from 2 to 6 points for a total of 60 points. The final part was a sheet describing the topic for an essay to be written in 150 to 200 words, the value of which is not given. Although this exhibit does not indicate into which of the seven categories the 60-point questionnaire and the essay fall, it would appear from Exhibit 190 that the essay was worth a maximum of 15 points and that it, together with the other part of the written test, constituted the "Knowledge" category worth a maximum of 75 points. Exhibit 190 is a marking table of some kind, set up in five columns: (1) Questions; (2) Comments; (3) Points (maxima); (4) Rating (blank space for candidates score); (5) An untitled column in which

there is a general description of what is being sought by way of information or answer. The "C. Knowledge" category appears in the first column, across from which, under "Points", is the number 75, followed by the descriptive comment "written exercise".

It is clear that by the time of this competition the relationship between the Complainant and his administrative superiors was strained to the point that any lack of success by him or his wife in obtaining a promotion would be viewed by them with suspicion. And their suspicions were heightened by attendant circumstances, beginning with their having been needlessly embarrassed when they took their initial places for the written part of the exercise. The Complainant indicated that he and his wife had felt demeaned by having been separated by the invigilators when they sat at the same table upon entering the gymnasium. When asked by counsel for the Respondents why this was done, Mr. Morris said (at the start of Side A of Tape 3 for April 9, 1997) that he could "only speculate that it was based on perceptions, that other people were competing for the same jobs and there may have been some speculation on their behalf that two people that were married would help each other on the test". During his testimony Mr. Poynter offered virtually the same bit of conjecture. However, that a failure to have separated them might have generated amongst their colleagues the suspicion of collusion between the McKinnons should either of them have succeeded is rather far-fetched since, according to Mr. Morris, there were two invigilators supervising only eighteen candidates who were seated at large tables in such a way as to have been unable to provide any unauthorized mutual assistance. This suggests an attempt to embarrass and disconcert the McKinnons.

In his complaint the Complainant alleges that the inquiries he made of each of the interviewers for information specifically as to his score and ranking were met with silence over a protracted period. He was informed of his lack of success on March 20, 1989 (Exhibit 18). Having been unsuccessful in obtaining the information he was after when he met with Mr. Morris on April 4 (the first of their meetings), the Complainant spoke to Mr. Mulhern about it on April 5, following this up with a note to him the next day listing the specifics he was after (Exhibit 19). His stated concern was not with where he had gone wrong and what he could do to remedy his deficiencies, but with getting (as he put it in point form): "the details of my ranking in competition scores; to be able to see my examination papers along with all related calculations for my total score; also

explanation of my scores with one of the board members who had final decision in the OM14 competition." On April 14, the Complainant wrote to Mr. Simpson to complain about four unsuccessful attempts to meet with Mr. Morris (Exhibit 20). That note was returned with a handwritten advisory from the Superintendent's secretary telling him to call Mr. Morris. A couple of months later he received what appears in the circumstances to be a strange memorandum from Mr. Morris, dated June 9, 1989, and filed as Exhibit 21. It reads:

Feedback Request – Competition CI-1025-89 Unit Manager

Pursuant to the request of June 9, 1989, on the above, please contact Mr. J. Morris, Area Personnel Administrator at 235-4969 to arrange an appointment for this purpose.

It seems plain to me that the Complainant was getting the proverbial run-around by a management that was well aware of his first human rights complaint lodged against, *inter alia*, Mr. Simpson and Mr. Hume. His unwillingness to accept whatever platitudinous explanation of his failure might have been provided in his first encounter with Mr. Morris, who apparently assured him at the time that he was "management material", and his insistence on obtaining specific data, seems to have led to stonewalling. In any event, in consequence of what understandably struck him as undue temporizing, the Complainant sought the intervention of the Office of the Deputy Minister (Exhibit 22).

In his testimony, Mr. Morris blamed the delays on the normal problems of scheduling meetings. He denied the Complainant's assertion that he had become angry over the Complainant's having "gone over his head" in approaching the Deputy Minister's Office. Indeed, he could not recall any reference to Acting Assistant Deputy Minister McKerrell having been made by the Complainant in any of their encounters in relation to the competition, of which the Complainant testified there were three: two at the Centre and then a final meeting in the office of Mr. Morris at regional headquarters some time near the end of June or beginning of July of 1989, which date is borne out by the Complainant's contemporaneous note (Exhibit 22).

While Mr. Morris recalled meeting the Complainant twice at the Centre, he could not recall a third meeting; but he did not deny that such a meeting might possibly have occurred. It was his impression that he did not have the documents required for feedback purposes when they met the first time, but that he brought photocopies to the second meeting in accordance with his practice of not removing the originals from the regional office. However, the Complainant testified that it was his concern over the lack of documentation at this second meeting at the Centre that prompted him to call the Deputy Minister's Office where he talked with Mr. McKerrell, and that it was shortly after this that the third meeting was set up in Mr. Morris's office, at which point some documentation was produced. Mr. Morris did not categorically deny any of this, but said simply that he did not recall such a meeting.

As to the statement attributed to him in paragraph 5 of the complaint, it was the Complainant's testimony that it was during their first meeting at the Centre that Mr. Morris told him that he was "management material". Mr. Morris had earlier testified that he did not think he had used the words "management material", but that he had said that he saw no reason why the Complainant could not "aspire to management". Under cross-examination he conceded that there was no material difference between those two phrases, thus supporting the Complainant's allegation in a material particular.

With respect to the allegations made in paragraph 7 of the complaint, the Complainant testified that it was during their second meeting at the Centre that Mr. Morris told him that: "Simpson doesn't want you ... say you had a human rights complaint ... you wouldn't get anywhere until it was dealt with ... it should be obvious to you that he is not going to advance anyone who has a complaint." This is suspiciously reminiscent of the incident reviewed earlier in which, despite his denial, I found that Mr. Hume had told Mr. Johnson that Ms Shaw-McKinnon "would not receive any type of promotion as long as he could stop it", a sentiment that (in light of evidence yet to be seen) I said I believe Mr. Simpson shared and which, therefore, I think him capable of having expressed. However, since Mr. Morris denied having ever said anything of the sort "in any way, shape or form", I have to decide which of these irreconcilable assertions to accept.

As is apparent, with respect to every instance dealt with thus far in which the primary facts are in issue, the Complainant's evidence has been found by me to be consistent and believable, while that of the Respondents has been found inconsistent and lacking credibility; and, as will become apparent, while I do not accept all the inferences the Complainant would draw from those facts, the same holds true for the issues that remain to be considered once these allegations regarding the competition have been dealt with. Since I believe that the Complainant was being truthful, and while Mr. Morris may believe that he would not (and, therefore, did not) make statements to the effect alleged, his recollection is admittedly unclear or absent in other crucial respects and I would conclude that he is at best mistaken in that regard. Moreover, Mr. Simpson, who as a Respondent had known of this particular allegation at least from the moment he was served with this complaint at the end of June, 1990, did not come forward to deny having ever made such comments to Mr. Morris, or to anyone else.

The Complainant testified that during the meeting at which documentation was produced he was initially shown just Mr. Morris's scoring sheet and comments, that he wanted more information and, because it was not forthcoming, asked if he could use the phone. The Complainant went on to say that Mr. Morris got up, slammed the door, asked what he wanted and, upon getting the reply that he wanted to see the scoring sheets for the other interviewers, retrieved them from his drawer and threw them across the desk. Asked in cross-examination "Do you dispute that that occurred?" he replied firmly, "Yes". Again, and for the same reasons as expressed earlier, I would conclude that he is at best mistaken.

Mr. Poynter was involved exclusively in the interview portion of the competition. He said that he had no recollection of the Complainant's having approached him for feedback, but added that "that does not mean it didn't occur". According to him, the practice was that only one of the interviewers would be designated to provide feedback and that Mr. Morris "as the personnel man was the designee" for this competition. Since it was he who had the documentation containing the information regarding all aspects of the competition without which meaningful feedback could not be provided, it was suggested that the Complainant would have been referred to Mr. Morris had he approached Mr. Poynter.

During the course of his examination-in-chief Mr. Morris was asked about the meeting between him and the Complainant referred to in paragraph 6 of the second complaint. He said that that meeting was intended to provide feedback, and that he had brought with him for that purpose photocopies of the interviewers' notes, consisting of several sheets written by himself and Messrs Mulhern and Poynter, the other two members of the interviewing panel. He confirmed that these notes had been written in pencil, although the totalling at the end might have been done in pen, and he agreed with the suggestion of counsel for the Respondents that if the Complainant had seen these sheets he might have assumed that they were written in ink because of the way such writing would appear in a photocopy. However, during cross-examination he admitted that if the meeting in question had been in his office at regional headquarters then the documents made available would have been the originals, rather than photocopies.

While he was puzzled as to why he would have told the McKinnons separately that each of them (as distinct from them both) ranked immediately behind the last successful candidate, Mr. Morris did not dispute their evidence in that regard, but pointed out that Ms Phillips' notes indicated that the McKinnons had been given identical total scores. However, those notes show that one other unsuccessful candidate had a score higher than theirs. Mr. Morris's testimony given in cross-examination regarding these matters is as follows (beginning at number 406, of Side B of Tape 1, for May 23, 1997):

Q. Do you recall whether you showed Mr. McKinnon the scoring sheets for yourself and the other panel members?

A. I don't recall whether all three were shown to him. ... I don't recall whether he saw all three, or didn't see all three.

Q. Do you recall whether you showed him any?

A. I had them with me. Again, I had them with me, I don't know whether I actually, physically, gave them to him or simply reviewed them with him -- it would mean retaining possession of them. I don't recall that.

Q. Do you recall Mr. McKinnon raising through the meeting his concern that there were marks in pen on the sheets?

A. No. They were xeroxed copies. I don't know how he could tell whether they were pen or pencils. ...

Q. Well, again --- You're certain there was no meeting in your office?

A. I'm not certain, no. I don't recall a meeting. I recall the two extensive meetings at the Toronto East. I don't recall a third meeting.

Q. I suggest to you that if in fact there was a third meeting in your office and that's where the documents were to be viewed, you wouldn't have had to photocopy them because you would have been meeting him at your regional office where they're stored.

A. My recollection is, I shared the documents with him at the second meeting at the Toronto East, and therefore would have no need to share the documents with him again. The purpose of the feedback was satisfied at the meeting at the Toronto East.

Q. It's just that I want to be clear though. The reason you think they're photocopies is that you don't take them out from the regional office.

A. Yes.

Q. And if you were reviewing documents in your office -- if you were -- there wouldn't be a need to photocopy documents for you to review with somebody.

A. No.

Q. Do you recall telling Mr. McKinnon where he ranked in the competition?

A. I believe during our second meeting that he did see the rankings, that he was shown the rankings.

Q. Mr. McKinnon testifies that he was told that he was next -- that he was -- in other words, the top person who didn't get a position. He testified that you told him that at the feedback meeting. And so you're clear, Ms McKinnon testified that you told her the same thing at her feedback meeting. Do you have any recollection of why they both say that?

A. I don't know why, if I had the results and I was sharing the rankings, I don't know why I would tell them that, if I had the rankings there.

Q. So are you denying you said that?

A. I don't know what -- without the total rankings -- I don't know where they, where their final ranking was, I believe they scored the same, based on the notes from Ms Phillips. And without the scores of all the candidates -- some of the scores aren't in there -- I don't know --

Mr. Morris said that he could not recall whether the Complainant confronted him about the writing implements used by the examiners during and after the interview portion of the competition, the significance of which is raised in paragraph 6 of the complaint. He said that the Complainant expressed the view that he had in fact succeeded and that, while the Complainant did

not "refer specifically to reprisals ... during the course, the -- when the feedback session lasted approximately three hours, and issues, other outside issues were brought up by the Complainant at that point with respect to his relationship with management". If the Complainant had stated baldly that he should have been recognized as a successful candidate and went on to cite problems he was having with management, as Mr. Morris indicated was the case, his purpose could only have been to suggest that he had been dealt with unfairly for reasons connected to his relationship with management, and it is difficult to believe that a reference to that relationship would not have included some allusion to his first human rights complaint -- of which, in fact, Mr. Morris was aware, as the following exchange during his examination-in-chief discloses (towards the start of Side A of Tape 2 for April 9, 1997):

- Q. And before we get into much detail, can you help me with your recollection -- do you recall whether you had in fact even seen this complaint -- this exhibit 12 -- before you participated in the March 1989 competition? ... I beg your pardon, Exhibit 11.
- A. My recollection is that I had brief knowledge in that, that, I had just recently take over -- taken over the Toronto East responsibilities. Ah, when a complaint such as made is forwarded to the regional office to assist in, in, the Respondents' questionnaire. Ah, I referred this to my supervisor, Tony Wallen, who was the regional personnel administrator, and he took it from there. So that that's the extent of my knowledge.

Although he could not recall discussing the matter with the Complainant, Mr. Morris's explanation as to the use of pencils and pens in the interview process was as follows (Side B of Tape 2 for April 9, 1997, beginning at number 32):

At the time of the interviews the process that was in place was a process of consensus scoring whereby you ask the questions, the three candidates [*sic*] wrote down notes appropriate to what the candidate was saying, and reviewed that and put a tentative score beside each question, and following the interview the panel went back through and basically went through question by question to say, okay, question number one, I gave him six points, and if the board were in agreement, and they'd reviewed the answer and said yes we feel that he had six valid points, then it was confirmed as six. As they went through the process, again being done independently initially, there were situations where based on the response to the questions that the preliminary score may have been different, from one scorer to another, and that's when the ensuing discussion developed. We reviewed the notes that were taken independently, the points that we had awarded based on what we

felt was an appropriate score. It came to a consensus in reviewing each -- any question or point that was in dispute was discussed to the point that we came to a consensus -- yes that was worth a point, or no, that wasn't worth a point. And then that would result in, if two people had given six and one person had given seven, and based on the consensus that it was a six score, then the seven on the one score would be changed to a six. ... With consensus -- you must come to a consensus on each question, so then you hash it out and some may go up, some may go down, depending on interpretations and discussions as to whether it was a valid point, or not a valid point -- and come to a consensus so that at the end of each question the three scorers agreed that that was an appropriate score for that question. ... The process was followed for each and every one of the candidates.

- Q. And were you satisfied that that was a reasonable, fair and appropriate way to score all of the candidates on all of these questions that we will look at in a few minutes?
- Y. Yes, that was consistent with the practices and guidelines in place for competitions at that point.

The system thus described is not particularly efficacious and is one that lends itself to abuse. There seems to be something untoward about a system that requires the use of a pencil so as to purposely change a part of a record to make it appear that all interviewers were *ad idem* from the outset, rather than to preserve the original marks and openly record a composite mark based on legitimate discussions amongst the interviewers. And Mr. Morris acknowledged that "consensus" marking has since been abandoned in consequence of a grievance decision. Nevertheless, he maintained that: "at that time it was the general practice and accepted rule to use pencil for the purpose of the fact that it was consensus scoring, that there was going to be changes to individual scores based on a review of the responses".

Of course, the issue is not whether it was a good system, but whether it was unfairly applied to the Complainant or his wife either because of his native heritage, or because he had lodged a previous human rights complaint. While there is no direct evidence that the alterations of the marks of candidates that occurred following the interviews in this competition and the fact that the Complainant and his wife ended up with identical scores (as shown in Exhibits 188 and 189B) was other than coincidental, it is the loss of the competition file that has deprived the Commission and the Complainant of the possibility of proving their allegations to the contrary by direct

evidence. Without access to the information contained in that lost master file it is not possible to examine the notes made by the interviewers to determine whether their initial scoring of either of these candidates was altered and, if so, by how much and why. Despite their insistence that the process was conducted fairly, Mr. Poynter was unable to shed any light on matters of substance and Mr. Morris's contribution was restricted to generalities.

As to the written part of the competition, Mr. Morris testified that these exercises were coded by him so as to be "blind-marked" by one of the Deputy Superintendents to whom model answers to the fifteen questions had been provided, after which they would be returned to him for decoding. Thus, barring some means of identifying candidates (such as by comparing their handwriting on the test with that of occurrence reports), this part of the test would appear to be tamper proof, as one would suppose would be the case regarding the Education/Development, Experience, Attendance and Performance Review categories, all of which were supposed to be scored on a completely objective basis: so many marks for a high school certificate, so many for a relevant college diploma, so many for the rank of CO3, so many for each month as an acting shift manager, and so forth. However, without access to the competition file and to cross-referencing information contained in other files (perhaps long since shredded, according to Mr. Morris), it is impossible to determine whether a candidate was accorded the correct score in any of these categories. The fact that an "error" was made in the score given to Ms Shaw-McKinnon in respect of her attendance record that was so serious as to deprive her of a promotion she clearly ought to have had casts grave doubt on the other elements of the scoring that depended on the accurate, complete and honest transmission and application of documentary information.

Mr. Morris explained that the scoring for attendance was based on a maximum of ten, and a minimum of zero, points for each of the four preceding years, with one point being deducted for each day of unauthorized absences during any one of those years. He agreed that it would be improper to take into account any absences sanctioned under workers' compensation provisions. However, Ms Shaw-McKinnon testified that during the interview Mr. Poynter had improperly questioned her about her workers' compensation absences. Since Mr. Morris had no recollection

of this and I found nothing regarding it in reviewing the tapes of Mr. Poynter's evidence, nor in my notes made at the time, I accept her uncontradicted evidence in that regard.

Although Mr. Morris was unable to recall having had a feedback meeting with Ms Shaw-McKinnon, she testified that such a meeting occurred and his letter advising her of his availability in the Centre for that purpose on the morning of June 20, 1989, was filed as Exhibit 71. She testified that during the course of their meeting she was told, amongst other things, that she had been given eight out of twenty as her score for attendance. After some discussion of this and the further examination of documents, she was told that her attendance score had been twelve out of forty. She was not challenged in cross-examination regarding this testimony. Whether the score that was factored into her final mark was eight or twelve is not now known because the Ministry lost, mislaid or destroyed the competition file. In any event, according to the best evidence available (*viz.*, Ms Phillips' notes of information gleaned from the competition file), the total score given to her on the competition seems to have been 162, tying her with her husband and placing them six points behind Mr. Duncan, who was the last of the successful candidates, and one point behind Mr. Dobson, who had the highest score of the unsuccessful candidates. Mr. Morris testified that even assuming she had raised this with him he would not have bothered to adjust her score because it would have made no difference; her score would not have been increased sufficiently to bring her over the threshold.

In the course of evidence elicited in reply, Ms Shaw-McKinnon testified that she had at counsel's request sought and obtained her personnel files which she then reviewed regarding her attendance in the years in question. Those records showed that she had eleven absences in 1985, six or seven in 1986 ("there was one date on one slip that I couldn't make out for sure, but I'll take it as seven"), three in 1987 and none in 1988. Thus, according to this evidence, which went unchallenged as well, her attendance score ought to have been at least twenty (0+3+7+10), and not the eight or twelve points suggested by Mr. Morris's confused information. This would have given her a total score of either 174 or 170, depending on whether she had been already credited either with eight or with twelve points, and it would have vaulted her into twelfth place ahead of Mr. Casey, a CO3 candidate whose score for experience was automatically higher than hers. Unlike his wife, the Complainant was not told at the time what score had been accredited to him

for attendance, and because of the loss of the competition file it is not possible for him to establish by direct evidence whether he was similarly deprived of a promotion.

These records were available to those responsible for the administration of the competition and were to be used by them to score the attendance category. I find it difficult to believe either that they did not consult the records or, having done so, would inadvertently make such a fundamental error in such an important context. Despite the physical impossibility of collusion between them, Mr. Morris went on at some length about the importance of separating the McKinnons during the written examination because career opportunities were at stake and it would not do to have other candidates second-guessing should one or both of the McKinnons have succeeded, and I think we are entitled to assume that at least a similar degree of importance would be attached to the accurate transposition of data from one file to another for the mechanical task of identifying such fixed scores as those attributed to attendance, education and experience.

Mr. Mulhern did not testify in these proceedings, but both Mr. Morris and Mr. Poynter denied that there was any collusion amongst them regarding the interview-assessment of the McKinnons, and there is no clear evidence to the contrary. While I find it significantly suspicious, the evidence of considerable alteration of the scores of various candidates and of pencilled marks being erased and replaced with marks made later in pen is consistent with Mr. Morris's explanation of consensus scoring. However, apart from the written exercise (which cannot be regarded as absolutely tamper-proof simply because it was coded), there was no testimony from any of the Respondents' witnesses as to who had control of the other categories in which the candidates were scored. What is clear is that the attendance category was improperly scored with respect to Ms Shaw-McKinnon, and it was not the only category that was open to manipulation.

While the loss of the competition file was viewed by the Commission and the Complainant with grave suspicion, counsel for the Respondents suggested that: "If there were things to hide it would have gone lost long before Ms Phillips got her hands on it. And if there were things to hide it would have been much more convenient, if there was some conspiracy afoot, to get rid of that file beforehand." Of course, if its overriding importance only became apparent when the file was called for in the course of the Commission's investigation, there may not have been time to get

rid of it beforehand. Moreover, it may be that the file contained no direct evidence in and of itself of impropriety motivating its intentional destruction, its loss at the time the Commission sought to re-examine it being particularly crucial in that it destroyed the possibility of comparing the scores given for the fixed elements of the competition (attendance, education, experience) with corresponding information then contained in personnel and other files. In any event, as I have already indicated, it is not clear whether the file disappeared while Mr. Simpson was in charge, or after he had been replaced as Superintendent by Ms Doherty.

As I have already indicated, in my opinion the evidence shows that Mr. Hume and Mr. Simpson did not want either of the McKinnons to advance. These top managers were named as Respondents in the first complaint, along with Mr. Geswaldo who, together with Mr. James whose misconduct was cited in that complaint, happened to be amongst the successful candidates in the competition, a circumstance that is ironic, if not indeed suspicious. However, while the evidence does not implicate Messrs Geswaldo and James in any wrongdoing regarding the competition, there is circumstantial evidence from which I am asked to draw an inference of wrongdoing on the part of one or both of the other two individual Respondents, or of someone on their behalf for whom the Ministry is responsible.

The facts as I have found them, and the inferences of fact already drawn, are: (1) that Mr. Simpson was in charge of the institution when the competition was held; (2) that he and Mr. Hume had indicated their opposition to any promotions for the McKinnons; (3) that Ms Shaw-McKinnon was denied the promotion she merited through a misrepresentation as to her attendance record; (4) that the Ministry, in breach of a positive obligation to preserve important evidence in a matter it knew to be under investigation, permitted the loss of the competition file (which I suspect would have been more assiduously guarded had it been clearly exculpatory), thereby frustrating the efforts of the Commission and the Complainant to discover whether that document might in conjunction with other files provide evidence of other possibly incriminating circumstances; (5) That the time of the file's disappearance cannot be established. To these five circumstances should be added a sixth that will be seen in considerable detail presently, namely, that shortly after the competition both Mr. Simpson and Mr. Hume committed other acts of reprisal against the Complainant.

Apart from submitting that these circumstances are insufficient to draw an inference of wrongdoing, all that is said in response is that in order to reach that conclusion I must find that the three members of the interview panel must have conspired to that end, a finding it is suggested defies common sense. However, that assertion fails to take into account that they were not the only persons involved in the process, at other stages of which the results may have been wrongly recorded, as witness the incorrect attendance information regarding Ms Shaw-McKinnon that was improperly factored into her final score. It is simply not good enough for the Respondents, caught in a morass of suspicious circumstances, to have two persons involved in one part only of the competition come forward to say, essentially, that they remember nothing except that they acted with propriety and feel sure that everyone else connected with the competition did so as well and that, while they are sorry about the loss of the competition file, one of them was told that at some unknown point of time the file had been returned to another branch of the Ministry whose fault its loss must therefore be. Furthermore, although Mr. Simpson was the superintendent of the Centre at the time the file was created, and perhaps as well at the time of its loss, he did not make himself available for questioning regarding the flawed competition that took place during his watch.

Thus, having regard to the findings set out above, and to the whole of the evidence in this case (including circumstances yet to be discussed, the cumulative effect of all of which weighs heavily against the Respondents), it is my conclusion that it is more probable than not that Ms Shaw-McKinnon's total score was inaccurately formulated, or recorded, in order to deny her a promotion because of resentment over the first of her husband's human rights complaints. Clearly, that is an act of reprisal aimed indirectly at the Complainant. Given that inference, since the Complainant was the principal target it seems more likely than not that his total score was similarly affected, which further inference finds support in the fact that he has since demonstrated his ability to do the job "extremely well", as will be seen in another connection. I will in due course deal with the consequences of my conclusion, reached after considerable reflection, that the results of the competition were tampered with.

The next incident of harassment or reprisal raised in the second complaint is described in paragraphs 9 to 11, which are as follows:

9. Since filing my human rights complaint, I have also been targeted for ongoing harassment by members of management involved in, or aware of, my complaint, which includes several efforts to create situations where I am accused of wrongdoing and may be disciplined.
10. On June 1, 1989, while I was carrying out a required task relating to the transfer of inmates on misconduct to segregation, Sgt. Phil James commented, in front of other staff, that I was making a "fucking mess".
11. I complained of this inappropriate behaviour to the supervisor in charge, Lieut. Al Dvorak, and an investigation was carried out with the involvement of Mr. Jim Hume and Supt. George Simpson. Nothing resulted from this inquiry, however, and I was told that the allegations could not be substantiated, despite the fact that CO Stan Beckta told management that he had heard the comment.

The Complainant explained that on May 31, 1989, he was dealing with a troublesome situation in the 5A unit involving the identification and removal of problem inmates from the area, a task that required the preparation of an occurrence report (Exhibit 23), log entries, and "inmate misconducts", and that he had asked Mr. James to come to the unit to remove some inmates. He said that he was later approached by Mr. Stan Beckta who "wanted to know what was going on up in the 5A unit" because Mr. James had told other staff members who had been trying to locate him in relation to some other work that he "had to clean up the fucking mess that McKinnon made in 5A." The Complainant testified that the problem he had been dealing with was not of his making, but that he "was the one that had inherited the mess", and in fact no question was ever raised concerning his conduct on this occasion.

Having regard to the relationship between him and Mr. James, and to his difficulties with senior management, the Complainant decided to report this episode to Lieutenant Al Dvorak and, on June 1, 1989, he sent an occurrence report to Superintendent Simpson in which he wrote, *inter alia*, that: "I informed Lt. Dvorak of my concerns with Sgt. James with a bit of a case history" (Exhibit 24). The following exchange with counsel occurred regarding that statement (Side B of Tape 1 for April 3, 1996, at about number 200):

Q. What -- when you say "a bit of a case history", what did you tell Lt. Dvorak?

- A. It was an exchange of ideas between Mr. Dvorak and myself. Mr. Dvorak indicated that Mr. James had been cautioned numerous times for his -- not only his behaviour, but his comments specific to other staff and that he should have known better, and that he had just cautioned Mr. James with comments about my wife just previous to this incident, and that he would look into it and do a full investigation.

Although the Complainant did not volunteer, nor was he asked, who it was who had told him of Mr. James's comment, Mr. Dvorak went ahead with some sort of investigation, the result of which was reported to the Complainant at a meeting on June 14, 1989, held in Mr. Hume's office. That meeting was the subject of a memorandum sent to the Complainant the next day, the tone of which I find quite bullying. That document, dated June 15, 1989, was filed as Exhibit 25 and it reads as follows:

This letter will confirm our meeting of June 14, 1989, at 15:45 hours held in my office in the presence of Mr. A. Dvorak, OM16.

The purpose of the meeting was to advise you of the results of an investigation recently conducted as a result of a report submitted by you, on June 1, 1989 regarding Mr. P. James, OM14.

During the meeting, I advised you that Mr. Dvorak had been the investigating officer and that at the conclusion of the investigation revealed that your complaints regarding Mr. James were found to be unsubstantiated.

Having been advised of the results of the investigation, you indicated that you were not totally satisfied and were now prepared to furnish the name of a staff member that could support your claim that you are being harassed by Mr. P. James, OM14. The officer you named was Mr. S. Beckta, Correctional Officer 2. At this time, I advised you that a further investigation would be conducted on receipt of a subsequent report. You were also asked if there were any other staff names you wished to submit as witnesses to your claim. You answered this question by saying, no.

You were further advised by this writer that you would be expected to continue carrying out your duties in a professional manner. It was further explained to you that Mr. James would also be fully advised of the results of this investigation, and of this meeting.

As I advised you during the meeting, this letter is for your information only, and should not be construed as a form of discipline.

It is difficult to see how a meaningful investigation could have been conducted without having asked the Complainant who his informant was, and the statement that "you are *now* prepared to furnish the name" of the informant wrongly suggests that the Complainant had been withholding information. In fact, no request for that information had been made. Clearly, had he refused to provide such information on request he would have been told then and there, and no doubt properly so, that the matter could not be investigated. Equally misleading is the statement that: "the conclusion of the investigation *revealed* that your complaints regarding Mr. James were found to be unsubstantiated", its implication being that they were demonstrably without foundation, thereby hinting at bad faith on the Complainant's part, rather than that the investigator had thus far found no evidence to support the allegation.

The second last paragraph of the memorandum seems designed to intimidate. Putting the Complainant on notice of the expectation of continued professional behaviour in carrying out his duties is either insultingly gratuitous, or it is meant to imply that the writer had some reason to believe such a warning to be necessary, in which case a proper foundation for issuing it was imperative lest future readers be misled – as, indeed, one might suspect to have been its purpose. Moreover, to exempt Mr. James, whose allegedly unprofessional conduct was in issue, from the same admonishment without providing evidence that in his case it would have been unwarranted betrays a clear bias in his favour and against the Complainant.

Since the document purports to be a summary of a meeting with the Complainant concerning an investigation into his report of alleged misconduct on the part of Mr. James, no question of misconduct on the Complainant's part having been raised, one can but wonder why it concludes with the disclaimer that it "should not be construed as a form of discipline" – unless, perhaps, the writer suspected its tone and innuendo might otherwise raise that suspicion.

As a result of that meeting, Mr. Beckta submitted an occurrence report that same day, June 14, 1989, in which he indicated that he had been trying to contact Mr. James and that when he "did get a hold of OM14 James I kiddingly said: where have you been hiding. He states he was writing and collecting reports for the shit c/o McKinnon caused in 5A". In view of this report the investigation was at some point resumed, but it was not until some months later, when summoned

to another meeting in Mr. Hume's office on September 19, 1989, that the Complainant heard anything further about it. As with their last meeting, Mr. Hume sent the Complainant a next-day follow-up memorandum which purports to summarize their encounter. Unlike the previous one, this document is not simply misleading, but reveals the improper manner in which Mr. Hume conducted that meeting, as witness the following extract from that three-page memorandum (filed as Exhibit 26):

As you will recall, I asked you the following questions and your response to each was as indicated:

Question: Why did you submit your written request seeking the results of the investigation concerning Mr. P. James, OM-14 to the Superintendent?

Answer: I always address my occurrence reports to the Superintendent.

Question: Why did you direct a copy of your request dated September 18, 1989 to the Human Rights Commission?

Answer: Because of the Human Rights complaint I have presently before the Commission. (When asked if you cared to elaborate on this answer you declined).

Question: Why did you direct a copy of your request dated September 18, 1989 to Mr. L. Crispino, Assistant Deputy Minister (Operations)?

Answer: To inform Mr. Crispino of my complaint with the Human Rights Commission.

Question: Have you approached anyone else in respect to this matter seeking the results of the investigation regarding Mr. James?

Answer: At this time, I cannot recall, I would have to check my notes.

Question: Where are your notes?

Answer: In Brooklin, at my home.

I consider Mr. Hume's questioning of the Complainant in this manner to be outrageous. Supposedly, the purpose of the meeting was simply to respond to an inquiry made of Mr. Simpson by the Complainant the day before regarding the status of an investigation into someone else's conduct. Mr. Hume's reference in that document to the "second investigation ... *which you had insisted be conducted* during a meeting which I had with you on June 14" betrays a degree of managerial unwillingness to investigate alleged misconduct unless pushed to do so. But, be that as it may, at this meeting the Complainant was told once again that his complaint about Mr. James was found to be unsubstantiated, the basis for which conclusion was not stated in the

memorandum nor, according to the Complainant, provided to him at that meeting. However, during the course of Mr. Dvorak's testimony an undated investigative report signed by him was produced and entered as Exhibit 95. While not suggesting that Mr. Beckta had been untruthful, Mr. Dvorak's report indicates that Mr. James denied having referred to the "shit" the Complainant was causing in 5A, insisting instead that his comment had been that "he [Mr. James] was having a shit day". In light of this, Mr. Dvorak concluded that the allegation was "unsubstantiated".

It might be noted, incidentally, that Mr. Dvorak's report has a "List of Attachments", one of which is "Enclosure # 6 - Written report submitted June 1, 1989 by P. James, Om-14". These "attachments", or "enclosures", were not included in the exhibit and counsel did not question him in that regard, nor was I aware of the significance of that reference at the time. However, either Mr. James's report of June 1 referred to his conversation with Mr. Beckta, or it did not. If it did not, why not? And if it did, how was it that Mr. Dvorak and Mr. Hume were unaware of Mr. Beckta's involvement until the meeting two weeks later? In any case, whereas Mr. James repeated that explanation during his testimony, Mr. Beckta maintained his version of the event. On the one hand, Mr. James's self-serving explanation seems rather facile while, on the other, Mr. Beckta's disinterested evidence has the ring of truth to it. It seems to me unlikely that a comment about how bad a person's day had been would be confused with a critical comment made about a third party, and the fact that the word "shit" fits into both versions does not change that.

Even assuming the "second investigation" to have been reasonable and its conclusion appropriate, instead of management simply letting it go at that, the Complainant was dealt with as though he was in some way at fault. First, he was scolded for not having directed his request to Mr. Hume who had, after all, indicated in his previous memorandum that he had but to call if he needed information. Then, he was subjected to questioning about matters that do not appear to have been any of Mr. Hume's business and, more important, in circumstances involving a serious conflict of interest. In my view, it was a flagrant abuse of authority for Mr. Hume, one of the Respondents in the Complainant's human rights claim, to summon the Complainant to his office professedly for one purpose, and then to cross-examine him in relation to matters pertaining to

his human rights case on the slim pretext that they were somehow germane to the subject of the meeting, that is to say, the conduct of Mr. James, not that of the Complainant. The following excerpt from the examination-in-chief of the Complainant regarding this document is instructive (still on Side B of Tape 1 for April 3, 1996):

Q. Now, the memorandum refers to a meeting which was held the day before, September 19, in Mr. Hume's office with Mr. Dvorak and Mr. Miller. And I understand that Mr. Miller at that point was the Vice-President of the Union? [That memorandum indicates that Mr. Miller attended at the Complainant's request, a precaution which, in the circumstances, appears to have been wise.]

A. Yes, sir.

Q. Now, it says that the purpose of the meeting was to facilitate your written request dated September 18 asking for the results of the second investigation. Had you made any requests prior to September 18 to learn the results of the second investigation?

A. Numerous verbal requests to Mr. Dvorak.

Q. And how were those requests to Mr. Dvorak answered?

A. It's out of his hands. It's with the senior administration.

Q. Now, what were you told about the conclusions that had been reached on the second investigation?

A. Again, they couldn't be substantiated. They wouldn't support my complaint.

Q. And you mentioned earlier that Mr. Beckta had filed a report about this --

A. Yes, sir.

Q. Have you ever seen a copy of that report?

A. Yes, sir.

Q. And, according to that report, the occurrence report filed, was Officer Beckta -- did he confirm your complaint?

A. Yes, sir.

Q. We will be hearing from Officer Beckta. Now, you then [a couple of unintelligible words] a series of questions and answers that took place at the meeting, and it first asks why you gave a copy of your request for an investigation to -- or why you sent that to the Superintendent, and your answer is that you always address your occurrence reports to the superintendent. You're then asked, according to this, why did you direct a copy of your request to the Human Rights Commission? Was that question asked of you by Mr. Hume in this meeting?

A. Yes, it was.

- Q. And it records your answer that it was because of the Human Rights Complaint you presently have before the Commission, and it notes that you declined to elaborate upon that answer. Can you explain today why you would have sent a copy of that report to the Commission in September of '89?
- A. To give them a flavour of the ongoing harassment that I received even up till the date that -- to keep them abreast of what was going on in that poisoned work environment.
- Q. [After a similar series of questions and answers regarding Mr. Crispino] Did Mr. Hume explain in any way why he was raising questions about the Human Rights Commission with you?
- A. It was inferred that, ah, it was airing the dirty laundry of the Ministry outside, and that concerned them.
- Q. Did he indicate to you whether or not he wished you --
- Q. [By Chairperson] I'm not clear on that. You said that it was "inferred". Was this an inference you drew, or was it something that he said?
- A. It was the way he was, um, posing his questions. Talking about people outside don't understand how the Ministry operates and, um, they want to -- they want to -- they felt that they were able to look after the issues internally.
- Q. [By Chairperson] And those were things that he said to you?
- A. Yes.
- Q. [By Chairperson] All right.
- Q. Did Mr. Hume ask you not to take things to the Commission?
- A. No.
- Q. What did you understand based on the whole conversation as to -- or did you have any understanding on the basis of the conversation as to whether Mr. Hume -- what Mr. Hume's feelings were or what --
- A. My understanding was that I had made a major mistake by going outside the Ministry. And that I would be dealt with.
- Q. And just so we're clear, by the date of this meeting you had filed the first Human Rights complaint?
- A. Oh, yes.
- Q. And Mr. Hume was a named party to that first human rights complaint?
- A. Yes, sir.

Since, for reasons already stated, I prefer the evidence of Mr. Beckta to that of Mr. James regarding this incident, it is my conclusion that the comment about the Complainant attributed to

him was in substance said by him. Since Mr. James was not named as a Respondent in the earlier complaint his conduct on this occasion cannot be regarded as having been engaged in by way of reprisal, nor was this particular unprofessional-like comment couched in racist language. However, in the absence of any indication of some other explanation for such improperly motivated conduct, and having regard to the earlier "drunken Indian inmate" episode and similar behaviour on his part involving incidents yet to be discussed, I would draw the inference that this was a part of the racist-based targeting of which the Complainant complains.

Mr. Hume's conduct in this affair is quite another matter. His reluctance to deal with the allegation against Mr. James, which was only overcome by the Complainant's dogged persistence; his attempts to put the Complainant on the defensive, his bullying and belittling treatment of the Complainant, and his blatant endeavour to glean information about, or to otherwise compromise, the Complainant's human rights complaint against him – all of these, in my opinion, amount to acts of retaliation directed against him as a direct consequence of his having filed his complaint of November 29, 1988.

The next incident cited in the second complaint begins with an episode that occurred the day before the meeting with Mr. Hume with which I have just dealt, and it is one that was undoubtedly in the minds of the principals at that time: Paragraph 12 of the complaint is as follows:

12. On September 18, 1989, when I raised a concern to management regarding the training and performance of a probationary CO on his first day at work, their response was to accuse me of some wrongdoing. I was ordered to submit a report on the matter, and to attend a meeting with Mr. Hume. I later received a letter from Supt. George Simpson regarding this incident, and was assigned to a new posting in Ward 2B. I believe that both of these acts constitute unjust discipline, and they are now the subject of a grievance.

The probationary employee in question was Mr. Fraser, who was called as a witness in these proceedings on behalf of the Commission and the Complainant. The Complainant's evidence in this regard was that, owing to a lack of adequate preliminary training Mr. Fraser had done things that compromised safety. Although there was considerable evidence as to the nature and quality of Mr. Fraser's actions that day, there is no need to set any of it out in these reasons. The

Complainant wrote an occurrence report in that regard, which included a reference to another young officer as well (Exhibit 27). Mr. Dvorak was assigned to investigate the matter. After gathering reports from others, he convened a meeting in his office on October 2, 1989, which was attended by Mr. Hume and Mr. William Lee as observers, the latter at the Complainant's request. Mr. Dvorak then prepared a summary for the Superintendent of this "Guidance Meeting" the purpose of which was "to offer guidance to the Complainant to ensure that he would properly work with and help in the training of new staff members assigned to work with him." That summary, which was entered as Exhibit 142, is to the effect that the Complainant's concerns were misplaced and that he had conducted himself inappropriately towards Mr. Fraser. This, in turn, led to Mr. Simpson's confidential memorandum to the Complainant of October 12, 1989, which was entered as Exhibit 28. (Incidentally, that memorandum is similar in tone and thrust to Mr. Simpson's reprimand of Mr. Weekes for having crossed paths with him, Exhibit 102 being a memorandum from him warning Mr. Weekes that: "unless you develop a more professional attitude and approach that will permit you to interact with people at all levels, in a less confrontational manner, you will never be assigned to work in the social programs area.") Mr. Simpson's memorandum to the Complainant reads as follows:

On September 18, 1989, you made several complaints concerning two (2) Correctional Officers, relating to in (*sic*) the inadequacy of their training, the fact that you had to work with and train one of them during one tour of duty, and that your safety in this institution was in jeopardy as a result.

You raised your concerns with the Unit Manager, Sergeant G. Ellis who, after investigating your complaints, provided you with responses to each of them. However, you then complained to others that Sergeant Ellis did not address your complaints or discuss them with you.

Later that same day you addressed these same concerns plus others to Sergeant V. Daley, stating that you were suffering added stress as a result of these concerns and the lack of consistency among supervisors.

As a consequence to your complaint, the officers and supervisors involved were instructed to submit reports in regards to them, in order that the matter be fully investigated. When these reports were brought to my attention, I instructed Mr. A. Dvorak, Senior Assistant Superintendent, Corrections (A) to conduct a formal investigation into all of these circumstances. He has now done so and I understand he has had a meeting with you and permitted Mr. W. Lee, union steward, to be present while he went over his findings.

Having now read the reports myself, I am once more left with the impression that as a Correctional Officer, you are the epitome of negativity and continue to maintain, what appears to be an obsession; that this institution, its management and operations are ineffective and that only you are in a position to decide what is best for all concerned. Your conduct towards Mr. Fraser, a young Correctional Officer assigned to work with you during his first day on the job, was deplorable. Instead of sharing your experience to assist and guide this young man to learn his duties and responsibilities, you took it upon yourself to point out his failings and berate him for the manner he was carrying out procedures he was obviously unfamiliar with. In doing so, you may well have destroyed this young man's incentive and initiative for the job and if not, certainly gave him reason to doubt his abilities to function as a Correctional Officer.

Over the years I have consistently attempted to counsel and assist you to handle your personal situation, but I am now satisfied the only measure that will prove effective is for you to seek professional intervention. You are again showing yourself to be in an unnaturally anxious and agitated state which is effecting (*sic*) your judgement and causing you to be a disruptive influence in this institution. So much so, that I intend to assign you to a position where you will have little contact with inmates and where you should have little or no concern for your safety. Therefore, you will be assigned to the 2B post indefinitely or, until such time as I am satisfied you have taken remedial steps to control your emotions and attitude. If this is not satisfactory to you I suggest, with the best of intentions, that you consider other means of employment which will be less stressful to you. If I can be of assistance in this regard, please arrange to see me.

While you will undoubtedly believe otherwise, this decision is made in the best interest of yourself and this institution and is, in no way, to be considered or construed as discipline.

Although Mr. Dvorak testified that he had found Mr. Fraser at the time upset and dejected to the point that he might not continue his career as a correctional officer, in fact that was not the evidence of Mr. Fraser who remained so employed at the time of his testimony some seven years later. During cross-examination Mr. Dvorak said that he "had no problem calling on the Complainant to do things" and he described the Complainant as a "good, competent officer who does his job well most of the time". Mr. Dvorak also acknowledged that the matters raised by the Complainant in his occurrence report were serious security and safety issues, and that the training period now is "three weeks in house, and on the job training in gaols". For his part, Mr. Fraser, who was a "casual" correctional officer at the time of the incident on which all this turned had the following to say about it (Side A of Tape 2 at number 528):

A. I don't remember too much. I didn't have any of my reports. Basically Mr. McKinnon's -- my first day as a casual during training I was assigned to work with Mr. McKinnon, I believe on the 3A units, court units, and I believe Mr. McKinnon had a problem working with a random casual, and I wasn't adequately trained in his opinion.

Q. Were you of the view that you had been adequately trained for the position at that time?

A. No. In my view I wasn't trained.

Q. And were there any incidents that occurred because of that training that caused any problems?

A. I can't remember too much as far as -- there were problems all through the whole day but I can't recall any particular incident. I know Mr. McKinnon brought his concerns to management.

Q. And what happened as a result of those concerns being reported to management by him?

A. Well, basically I had to write reports all day and --

Q. Did you continue to work with him?

A. Yes I did.

Q. Did you work with him the next day, too? Or were supposed to be working with him the next day?

A. I can't recall at this time.

Q. Did you have occasion to learn that Mr. McKinnon was sent to work on Unit 2B?

A. Yes.

Q. And can you explain your understanding as to why he was sent to work on unit 2B?

A. My understanding at the time that he was sent to work on 2B at the time -- he was there for quite awhile after that incident, I don't know how long. There's a -- more or less as a punishment for that incident with me and previous incidents -- I don't know what --

Q. Did you have an understanding as to why he would be punished for the incident with you?

A. Maybe because he complained that I -- that he was working with casuals inadequately trained at the time. That's not his -- he should -- that's not his job to train casuals. ...

Q. Did you state your understanding of Unit 2B -- is it a perk posting, or is it a posting that is a particularly difficult posting?

A. ... I myself hate it. I don't like working there myself.

Q. What would be the typical time period a person would work on 2B?

A. Oh, we didn't have any platoon system back then, so in my experience I have been bounced from one unit to another within a week at least. You never worked the same units.

Q. Your answer, then, is approximately a one week period?

A. Yah. ...

Mr. Fraser, who clearly held no grudge against the Complainant, suffered no lasting ill-effects from the "traumatizing" experience as depicted by Mr. Simpson in his memorandum of October 12. Nevertheless, in consequence of his having complained about Mr. Fraser's lack of training, the Complainant spent some three and one-half to four months in ward 2B. Mr. Fraser's view of a 2B posting was shared by Messrs Johnson and Stockwood, as well as by Mr. Derek Miller who said that it is highly unusual to be assigned there for more than a "couple of days, a week at the most". He said "It's a kind of isolation, and subjects you to ridicule". He went on to say that it was the general perception that the Complainant languished there "because of the issues he raised [and that] he was being taught a lesson". Mr. Miller said he heard "comments about the assignment - joking, laughing, 'it serves him right'." The punitive character of a lengthy posting to the 2B ward is further borne out by Exhibit 245, entered in these proceedings during the cross-examination of one of the Respondents' witnesses. That exhibit consists of a hand-written memorandum in which Mr. Stanley Parulski notes that:

Mr G. Simpson stated "If you don't mind your own business, you will end up like that officer which is on 2B." The only person which is assigned to 2B to my knowledge is Mr. M. McKinnon. I must gather from this comment that Mr. G. Simpson made that he is referring to Mr. M. McKinnon, and that he is singling out persons who have concern about safety, and security of the institution. Just like in my case.

Undaunted by this treatment, on November 19, 1989, the Complainant filed a grievance in respect of Mr. Simpson's memorandum and the measures taken against him reported therein. The

decision of the Grievance Settlement Board allowing the grievance was handed down on January 22, 1992. The GSB found the Complainant's transfer to 2B to have been unjustifiable and to have "subjected him to a public punishment before his co-workers and supervisors", and it ordered the Ministry to destroy all copies of the October 12, 1989, letter in its possession and to post in a prominent place for a period of seven consecutive days the following notice:

In the fall of 1989, Mr. Michael McKinnon, Correctional Officer, was assigned to 2B for a period of approximately three and one-half months. The Ontario Crown Employees Grievance Settlement Board found this assignment to have been disciplinary and that the discipline was imposed without just cause. This notice is posted pursuant to the direction of the Board.

The decision of the GSB, which was entered as Exhibit 29 in these proceedings, shows that the evidence before that tribunal was substantially the same as that which was adduced before me. That evidence establishes that a lengthy assignment to 2B is generally seen as a "punishment posting" and, notwithstanding the use of the disclaimer of which the Centre's management seems inordinately fond, the letter is clearly disciplinary in character. Indeed, after the grievance was filed the Ministry wrote to the Complainant to say that it had withdrawn the letter and that therefore there was nothing to grieve – a submission roundly rejected by the GSB which stated (at page 13) that: "While the Employer has the right to transfer employees in the exercise of its managerial rights, it may not transfer employees as a disciplinary measure to avoid its obligation under the Collective Agreement to discipline only for just cause by virtue of having chosen this method of disciplinary action". The GSB then went on to reach the following unanimous conclusions with which my assessment of the evidence before me is in complete accord:

... It is clear, in our view, that the purpose of the transfer was to punish Mr. McKinnon. ... It is our conclusion that just cause has not been established. The events of the morning of September 18, 1989, give rise to some clear objective basis for Mr. McKinnon's concerns. Aside from the matter of whether Mr. Fraser asked the inmates about going to the yard, the evidence is clear that Mr. Fraser demonstrated a lack of knowledge about the keys and the daily damage report. As well, there is no dispute that he left a cell door unlocked. Whether or not Mr. Fraser lost sight of Mr. McKinnon while Mr. McKinnon was in the cell area, Mr. Fraser acknowledged that the inmates were crowding the door. The employer's witnesses acknowledged that leaving a cell door open and allowing inmates to

crowd the grille door are serious matters. While Mr. McKinnon could have been more diplomatic in his dealings with Mr. Fraser it must be recognized that in the work environment of a correctional institution such concerns may have serious implications for the safety of a correctional officer. We are convinced that Mr. McKinnon was raising sincerely held concerns about Mr. Fraser's training. It is significant that Sergeant Daley felt that the matters raised by Mr. McKinnon were of sufficient concern that he made recommendations. ... Given Mr. McKinnon's positive obligation to report such matters, his action in doing so in the circumstances of this case does not properly give rise to the imposition of discipline. Accordingly, our conclusion is that the discipline imposed on Mr. McKinnon was unjust.

It is instructive to compare Mr. Hume's memorandum of September 20, 1989, and the circumstances surrounding it with Mr. Simpson's memorandum of October 12, 1989, and the circumstances in which it was written. Both situations arose out of occurrence reports written by the Complainant which, although quite properly submitted by him, backfired.

In the first case, the Complainant reported an incident that involved an alleged transgression by Mr. James (who was implicated in the first complaint) of the standing order that in "the course of their duties, employees will exhibit courteous and professional conduct in all their dealings with each other" (Exhibit 142, last page). An investigation was pursued with great reluctance, and while Mr. James was cleared of any wrongdoing supposedly because (despite Mr. Beckta's report) the allegation could not be substantiated, the Complainant was implicitly branded a trouble-maker and subjected to a shocking inquisition duly (and, in view of its self-incriminating character, bafflingly) documented for his file and for the information of the Superintendent who presumably knew all about it already and might well have been the directing force behind it. After all, quite apart from the fact that as co-Respondents it is likely that they regularly discussed the Complainant's human rights complaint, as Mr. Poynter pointed out, the Senior Management Committee met daily for substantial lengths of time and this was the kind of matter that came up for discussion.

In the second case, on the very day that he inquired of Mr. Simpson as to the status of the previous matter, the Complainant reported a serious breach of safety by a self-admittedly ill-trained casual employee. Ironically, his having done so is in accordance with a standing order

requiring all employees to "be vigilant and promptly report safety and/or security breaches". The same Mr. Dvorak who "investigated" the first complaint, concerning which he was being pestered by the Complainant, was then assigned to look into the second complaint as well. Again, Mr. Dvorak, who seems to have been something of a cat's paw in these matters, turned the tables on the Complainant. Despite the clear and real foundation for the safety concerns raised by him (which, in fact, led Mr. Vince Daley to recommend changes), the Complainant was neither commended, nor simply left alone. Instead, he was found guilty of a breach of the standing order on deportment that Mr. James regularly defied with impunity, banished to a remote corner of the Centre and provided with a grossly disparaging memorandum suggesting, *inter alia*, that he is mentally unstable and that he ought to consider seeking employment elsewhere, in which quest Mr. Simpson would be only too glad to assist him since, after all "over the years I have consistently attempted to counsel and assist you to handle your *personal situation*". This last from a man whose only close involvement with the Complainant seems to have been to create the very "personal situation" of which he remonstrates and which led to the human rights complaint!

In both cases, there was a flagrant abuse of authority brought to bear on the Complainant in a human rights case by persons who stood accused of the violation of those rights. In neither case was there just cause. Clearly, the only conclusion that can possibly be reached is that Mr. Hume, who testified but did not otherwise appear at these proceedings, and Mr. Simpson, who did neither, acted improperly in retaliation against the Complainant for having sought to enforce his rights under the *Code*.

Paragraphs 13, 14 and 15 of the Complainant's second complaint were withdrawn, and the next incident to be dealt with is described in paragraph 16 of that complaint as follows:

16. On January 1, 1990, Cpl. Frank Geswaldo attempted to have me abruptly removed from the unit to which I had been assigned, and replaced by a casual employee, without explanation. He was overruled by the supervisor in charge, Lieut. Dick Groulx.

The Complainant's evidence regarding the January 1, 1990, incident was that he was informed by a casual employee while on duty during the night shift that Mr. Geswaldo had instructed her to replace him, and that he was to leave the 2A unit and go to the 2B area instead. He said that

he went to see the supervisor, Mr. Groulx, who knew nothing about it and overruled Mr. Geswaldo. Mr. Geswaldo's testimony regarding the alleged incident was simply that he had absolutely no idea what the Complainant was talking about. For reasons of credibility, I accept the Complainant's evidence regarding this episode which, while insignificant in itself, is part of a pattern of retaliatory behaviour.

Before turning to the next matter raised in this complaint it is convenient to consider the Complainant's testimony about another incident that he alleged occurred on or about the same date of January 16, 1990, and regarding which he filed as Exhibit 30 a contemporaneous note. On the occasion in question, a situation of overcrowding required the Complainant to relocate six inmates. When one of them balked at the move, Mr. Geswaldo upheld the inmate's objection, picking someone else instead, thereby embarrassing the Complainant whose authority and credibility were thus undermined.

Mr. Geswaldo's evidence regarding this incident was that he had told the Complainant to seek six volunteers for relocation, failing which he was to remove the last six inmates to have been placed in the overcrowded area. It would seem to me that, even if a correctional officer had been told to seek volunteers for relocation, once he or she had mistakenly selected inmates for that purpose that officer's authority would be undermined by a failure to uphold his or her selection, and the proper response would be to deal with the officer's mistake in some other way. Thus, even if I accepted Mr. Geswaldo's explanation, I would incline to the view that his reaction was unnecessary and done to embarrass the Complainant. However, since for reasons already noted I prefer the testimony of the Complainant to that of Mr. Geswaldo wherever their evidence is in conflict, I accept the Complainant's version of this event.

I turn now to the incident that is set out in paragraphs 17 and 18 of the second complaint as follows:

17. On January 16, 1990, I spoke briefly to a nurse who came to my unit wanting to medicate an inmate during a meal period, commenting that if she had called ahead to notify the unit we would have had the inmate ready. Shortly thereafter, Cpl. Frank Geswaldo instructed me to do a

report regarding an alleged incident concerning the nurse, whom he said had made a complaint about my actions.

18. He would not tell me what her complaint was, so I requested an immediate meeting with the supervisor in charge, Lieut. Ron Meloche. He met with the nurse and the head nurse, who said that they had not wanted to "make a big deal", and that it was Cpl. Geswaldo who had insisted on a report. The nurse said that she had simply commented that she hadn't known that she should call ahead. Nonetheless, I received a critical memorandum from Deputy Supt. Paul Mulhern which was copied to my personnel file.

The incident in question occurred while the Complainant was working in unit 5B with Mr. Worrell. The Complainant's testimony was that he had informed the nurse, Ms Giffen, of the inconvenience in having to remove inmates for medication during meal time without prior notice, and that she had said that she had had no instructions to call ahead. He was later approached by Mr. Geswaldo who said that Ms Giffen had complained to Ms Collins, the head nurse, and that he was to write a report about the incident. The Complainant's occurrence report, filed as Exhibit 31, states in part that:

... After completing the meal procedure in 5C East I was asked by Sgt. Frank Geswaldo "What happened up here". He then stated the nurse wrote a complaint about me. He pointed both hands at me requesting that he needed a report. As we walked from the [unintelligible] I asked Sgt. Geswaldo who was pushing for the report. He started to laugh and said "give me a report" and then left the unit.

In his testimony Mr. Geswaldo said that, having learned that a nurse was upset over her treatment in the 5C unit where the Complainant and Mr. Worrell were working, he went to the nurse's station and spoke to Ms Collins and the nurse (Ms Giffen) who told him what had happened. Mr. Geswaldo said that she was "totally petrified and shaking like a leaf" and that, after telling her he would obtain "their version of the story" from the two officers, he then advised them both that the nurse had complained and, in accordance with standard practice, instructed them to submit reports indicating what had occurred. That, he swore, was the extent of his involvement in the affair which he said he believed was resolved following a meeting involving Messrs Meloche and McKinnon with Nurse Collins.

The Complainant's occurrence report indicates that at this meeting Ms Collins said that Ms Giffen had complained about his behaviour and, when asked for specifics, could only say: "My nurses don't have time to call ahead and they shouldn't be told its to (*sic*) inconvenient". The report goes on to indicate that when Lieutenant Meloche then suggested that the nurse be called in, Ms Collins "became defensive" and said that "it wasn't she who wanted the report it was the sergeant who was requesting the report". When Ms Giffen joined the meeting she repeated that her complaint was only that "I have no written instructions to call ahead", and she added "I didn't want to make a big thing of this".

The description of this incident provided by Mr. Worrell, who was called as a witness by the Respondents in relation to other matters, was similar to that of the Complainant whom he said he had not thought at the time to have been "out of line" in any way. According to him, Ms Giffen had said that she would check to see if she really had to call ahead, and her discussion with the Complainant did not seem to him to have been acrimonious. His occurrence report regarding this incident, which was filed as Exhibit 164, is as follows:

On Thursday 16th January 1990, I was assigned on unit 5C with CO McKinnon. Shift 1500-2300 hours. At approximately 1615 hours CO McKinnon was engaged in feeding 5C East. Duty Nurse J. Giffen came to unit and said that she had to give inmate [so and so] an insulin injection. I notified CO McKinnon. He instructed the servers to proceed with the set up, and left the area. As we walked towards 5C West CO McKinnon asked the nurse if she had called ahead. She replied "No" and added that she did not know that she had to. CO McKinnon said that if she had, the inmate would have been left out for her. Officer McKinnon then entered the unit and the inmate was released from his cell for treatment. Nurse Giffen left the unit. We resumed feeding.

It seems quite apparent from all of this that Ms Giffen felt mildly annoyed by the Complainant's observation about calling ahead, that she related this to Ms Collins who, in turn, mentioned it to Mr. Geswaldo who then seized the opportunity to promote a trifling matter involving the Complainant into an incident requiring the writing of reports that might have a negative impact on him. It also seems apparent from this that Mr. Geswaldo exaggerated to the point of untruthfulness when he described Ms Giffen's encounter with the Complainant as leaving her "totally petrified and shaking like a leaf" when he saw her some time later.

The final incident raised in the second complaint is described in paragraphs 24 and 25 in this way:

24. On or about January 30, 1990, my wife was called a "bloodclot" officer by Sgt. Phil James. The term "bloodclot" is a derogatory term used by some Jamaicans to describe women. Mr. James is of Jamaican background.
25. My wife complained of this insult, but nothing was done after an investigation by management. She was told that the comment wasn't meant to be derogatory.

Ms Shaw-McKinnon's evidence regarding this incident was in substance the same as the account of it given in her occurrence reports filed as Exhibits 73 and 74, with the gist of which Mr. James agreed. In consequence of her refusal to accept his purchase order because of the circumstances in which it was made, Mr. Culmer, a Jamaican inmate, became angry and repeatedly referred to Ms Shaw-McKinnon as "blood cloth" (which, as Mr. James explained, may sound like "bluud clot" when said derisively by a Jamaican). Mr. James, who was leaving the 4C unit and heading for the elevators in the 4B unit, overheard these comments. Mr. Culmer called out to him, apparently in hope of his intervention, and Mr. James said: "Speak to the 'blood cloth' officer you just insulted". When Ms Shaw-McKinnon expressed her disapproval of his having repeated that expression in reference to her, Mr. James said if she did not "see where he was coming from he felt sorry for her".

Exhibit 73 is Ms Shaw-McKinnon's occurrence report objecting to Mr. James's conduct on the occasion, and Exhibit 74 is her occurrence report regarding Mr. Culmer. Although it was suggested in argument that there was something untoward in her having filed a report regarding Mr. James before filing one regarding Mr. Culmer, that sequence merely suggests that she viewed the repetition of the offensive comment by a manager as more serious than the original offense by an inmate. Mr. James filed an occurrence report as well (Exhibit 116). His explanation was that it appeared to him that either Ms Shaw-McKinnon did not understand the insulting nature of the expression or chose not to act on it. He did not know at the time that she had "cautioned" the inmate over his language and, "with that in mind", Mr. James testified (at number 124 of Side A of Tape 1 for December 4, 1996) that:

... I thought, well, I'll put this guy in his place. She was not present when I said that to him, though she did hear the comment. After I got to the elevator, and then she walked out with "don't you be encouraging him", I thought, "well, here we go now, I'm going to be accused of something demeaning, whatever" when all I was doing was trying to back her up and support her so that this fellow wouldn't feel he could talk to staff like that. I felt that if she -- at that time I felt that if she had known what it was, or that it was a swear word, and it was that bad to her that, me being her immediate supervisor and at the floor at that time, I felt one of her actions would have been, "I want to place this guy on misconduct because he's using foul language and he's being disrespectful," et cetera, et cetera, et cetera, and then I would have taken the inmate out, taken him downstairs and put him in segregation on misconduct for use of foul language. She didn't approach me with that. She simply turned around and walked away. So by doing that I thought, well either you don't know or you don't want to charge this guy. So my actions were, well, "I know what he's doing. I'm going to talk to him about it, in my way." She then took that and turned it around as me putting her down.

The incident was investigated by Lieutenant David McKinnon whose report to Mr. Simpson, entered as Exhibit 117, concludes that, "although she indicated that she was not satisfied" with his decision, because Mr. James had "perceived his comment to bolster the position of C.O. Shaw-McKinnon", he "must nevertheless conclude that no disciplinary action be taken against Sergeant James."

I do not accept Mr. James's explanation. To begin with, his having stressed that he thought Ms Shaw-McKinnon could not hear him suggests that he might not otherwise have made the remark. However, if the remark were perfectly innocent, if it was something with which she ought not to have taken offence, if she should have seen "where he was coming from", then there would have been no reason to refrain from making it in her presence, nor for any second thoughts about having done so. Moreover, while Mr. James thought Mr. Culmer's conduct sufficiently serious to warrant putting him in segregation on a "misconduct for use of foul language", and although he clearly had the authority to do so without Ms Shaw-McKinnon's having first to make such a request, he says he decided to "back her up and support her" by speaking to the inmate "in my own way", which was simply to reply to Mr. Culmer's request that he accept his purchase order by repeating the insulting words. The rejoinder, "Ask the 'blood cloth' officer", made almost in passing as he went on his way to catch the elevator, does not seem to be in the least supportive

of the insulted officer, nor does it appear to be a rebuke calculated to instil in Mr. Culmer the respect for her that his conduct had just shown to be wanting.

While a perhaps understandable reluctance to recommend disciplinary action against a fellow supervisor (even though of lower rank) might explain Lieutenant McKinnon's willingness to accept what I would view as a glib explanation, I do not see how management could properly avoid a more constructive resolution of the matter. As his own report shows, it was made clear to Lieutenant McKinnon, and through him to Mr. Simpson who knew full well the context colouring this confrontation, that Ms Shaw-McKinnon felt insulted by Mr. James's conduct and was not satisfied with the lieutenant's decision. Nevertheless, upon receipt of that report Mr. Simpson sent an undated memorandum to Ms Shaw-McKinnon (Exhibit 75) in which he concluded that: "Having considered all of the facts, I am quite satisfied that Sergeant James used language that would be readily understood by a Jamaican inmate in order to chastise him."

While "blood cloth" may be the Jamaican equivalent of "bitch" or "slut", there was no expert evidence before me to the effect that in Jamaican culture what occurred on that occasion would be regarded as a form of chastisement. If Mr. Culmer had called Ms Shaw-McKinnon a "bitch" or a "slut" before asking Mr. James to intervene, would it have been a form of chastisement for Mr. James to have responded, "Ask the 'bitch' officer", or "Ask the 'slut' officer"? The expression "blood cloth" might be an unfamiliar scatological term to many of us, but I dare say that Jamaicans would not view its use by Mr. James on that occasion as any more disciplinary vis-à-vis Mr. Culmer than others would view an exchange with a non-Jamaican identical in all respects save for the substitution of "bitch" or "slut" as the offensive term.

Mr. James's remark was, as Ms Shaw-McKinnon rightly pointed out, clearly insulting on its face, and I find his explanation unconvincing and management's ready acceptance of it disconcerting. At the very least, one would have expected Mr. Simpson to have acknowledged that the remark was *prima facie* unacceptable, to have provided assurance that Mr. James had been cautioned against any future use of a tactic that others might find offensive, and to have had him offer his explanation to Ms Shaw-McKinnon with an expression of regret at having been misunderstood.

Instead, Mr. Simpson, in effect, patronisingly told Ms Shaw-McKinnon that she should not concern herself about the matter because referring to her in that context as a "blood cloth" was an act of kindness initiated by Mr. James in her interest. It was done, he wrote, "not to derogate you but to chastise the inmate direct his concerns back to you and enhance your authority".

Even if Mr. James actually convinced Mr. Simpson that his remark was an effective and proper form of chastisement resorted to by Jamaicans, he failed to convince me of it; and I rather doubt that Mr. Culmer felt in the least subdued by it. In the final analysis, Mr. James's closing comment to Ms Shaw-McKinnon was allowed to go unrepealed and un-repentent: "If you don't know where I'm coming from, I feel sorry for you." More apt, in my judgment, is the closing comment in her occurrence report that: "Should Sgt. James have difficulty in seeing how he encourages this [name-calling] behaviour by his comments and conduct, then the exact opposite of his statement is true: I, in fact, feel sorry for him."

As I have already indicated, I do not believe Mr. James's explanation for his comment and I find that the way in which Mr. Simpson dealt with her complaint was inappropriate. Given the circumstances involving these Respondents that have been reviewed, I think it more probable than not that the one acted improperly, and the other improperly failed to act, because of Ms Shaw-McKinnon's relationship to the Complainant.

5. Relevant "Third-Complaint" Circumstances

Although the Commission declined to seek the appointment of a Board to hear the Complainant's third human rights complaint, which was signed by him on April 2, 1992, as indicated at the outset of these reasons, evidence regarding a number of post-complaint events was admitted as being relevant to the remedies the Commission and the Complainant are seeking in terms of various orders that it would be pointless to make if prior to this hearing the work environment of the Centre had become virtually free of racial discrimination and harassment. However, as indicated in my interim decision of April 9, 1996, the Complainant:

... does not propose to use the evidence in question in relation to the question of liability, which he is satisfied will be amply demonstrated by evidence relating to events leading up to the complaints that are before this Board, nor will any damages be sought in relation to post-complaint events.

The first of these incidents that was dealt with in argument occurred on unit 4B and involved Mr. James. As it happens, the substance of this 4B incident is set out in the aborted complaint which was filed by the Respondents as Exhibit 235 in relation to the testimony of Mr. Mikel heard on September 2, 1997, regarding yet another matter. The relevant paragraphs of Exhibit 235 are as follows:

12. I have experienced further harassment by Sgt. Phil James. On March 19, 1991, while working on Unit 4B along with another correctional officer, we experienced a number of problems with inmates. One inmate was placed on a misconduct. I consulted with two supervisors, Mr. McCann (OM14) and Mr. R. Simpson (OM16) and we decided to shut the inmates phones off for the remainder of the shift. When I advised the inmates that the phones would be turned off, I asked them if they wanted to speak to a sergeant and they declined.
13. Sgt. Phil James then arrived on the Unit and spoke with an inmate. He then told me to give all the inmates tobacco and complaint forms He brought extra complaint forms to me. When I took them to the inmates they said they did not know what they were for.
14. Sgt. Phil James grabbed the forms from me and handed them to the inmates. He then complained to me about the phones being turned off and said the inmates were complaining about me.
15. I told Sgt. James that other supervisors had been involved in the decision to turn off the phones, and I contacted the other supervisors.
16. Sgt. James told me he wanted me to file a report concerning the incident.
17. Sgt. James then entered into the log book on the Unit, which is read by all officers working the Unit, that all of the inmates in the Unit were complaining about me.
18. I have filed a grievance concerning these events. The Ministry and the Union have agreed that the grievance will be held in abeyance pending the resolution of all of my Human Rights complaints.

The incident on unit 4B as described above was in substance confirmed by the whole of the evidence adduced at the hearing. Having reviewed the relevant testimony and exhibits, I have concluded that what transpired was that the Complainant and his partner on the unit that day, Ms

Debbie Mattingly, had experienced such difficulty with the inmates that their immediate supervisor, Mr. McCann, in consultation with the shift supervisor, Mr. Robert Simpson, decided that the inmates' phones should be disconnected for the rest of the day. Then, while the Complainant was otherwise occupied, several upset inmates congregated at the grill door and questioned Ms Mattingly about that decision. According to her four-page occurrence report, she "informed them that the phones were to be off for the rest of the day as per OM14 McCann ... because of the problems in the morning. I suggested that they should speak to OM14 James" who was simply passing through the unit at the time, his assignment that day being elsewhere. When Mr. James approached her, Ms Mattingly, who was not yet a classified employee and was admittedly unsure of herself, sought his intervention. She then observed him speaking to the inmates at the grill door for about five minutes. Without consulting anyone, Mr. James caused the complaint forms to be circulated and improperly recorded the incident in the log book in terms unflattering to the Complainant who, quite predictably, took exception to all of this. Ultimately, occurrence reports were provided by the Complainant (Exhibit 68) and Mr. James (Exhibit 118), while Ms Mattingly produced both a one-page and a four-page occurrence report regarding this one event which were filed as Exhibit 67. Mr. Carter investigated the incident and sent an eight-page report (Exhibit 84) to Superintendent Doherty.

In his report, Mr. Carter indicates that the proper way for someone in Mr. James's position to have handled the matter (assuming that the inmates had, indeed, given him adequate grounds to do anything) would have been to speak with the staff (*i.e.*, both the Complainant and Ms Mattingly) as well as with the area or floor supervisor (Mr. McCann) and the officer in command of the shift (Mr. Robert Simpson), and to obtain inmate statements only "if more information is required or the situation warrants it". Mr. Carter's report goes on to indicate that while the shift supervisor, Robert Simpson, agreed with Mr. James that it was a manager's right to request such statements, he had qualified this by adding "but only when necessary". It is clear that in Mr. Carter's opinion the circumstances in question did not warrant such action, and "Mr. James should have consulted the floor or unit manager Mr. McCann who was aware of what was going on".

Obviously, the inmates were not going anywhere, and there was nothing in the evidence suggesting that Mr. James was faced with an emergency that required him to circulate these forms without the consultations that professional courtesy, fairness and proper procedure dictate. Despite Mr. Carter's feeling that Mr. James had acted with "good intentions", having regard to circumstances of which that investigator was at best only vaguely aware, the unseemly haste with which Mr. James apparently accepted at face value the inmates' complaints and decided to gather their statements strongly suggests to me an ulterior motive in his having done so. In any case, as they are of some significance to other matters as well, it is necessary to set out the following conclusions reached by Mr. Carter in his report to Superintendent Doherty:

Madam, after interviewing the staff involved, reading their reports and reading I/m [inmate] statements, I find numerous errors in communication which caused this incident. (1) The first error being that Ms Mattingly directed the wrong supervisor to the 4B unit. (2) That Mr. James not being the unit manager and not aware of the facts, began an investigation into complaints of inmates that may have been answered by Mr. McCann the unit manager at that time if consulted. However, I must admit that Mr. James had only good intentions when he started his investigation and he was only attempting to help one of his peers. (3) I find that Mr. James didn't interview all parties involved, to get the whole picture prior to starting his investigation. (4) I find that the communication between Mr. James and Mr. McKinnon was not clear and as a result this may have fanned the flames in this incident. It is quite clear to me that a problem exists between Mr. James and Mr. McKinnon for what ever reason and it is directly affecting their ability to work together. As a solution to the problems perhaps a roundtable discussion may resolve this matter, but somehow I doubt this. Fail this effort (*sic*), perhaps an independent party could result (*sic*) this problem through a fact finding meeting. Perhaps Mr. McKinnon could be removed from Mr. James direct supervision and this may be a temporary solution. The final solution may be an investigation into this matter or claims by Mr. McKinnon by a Ministry Investigator which would conclude this matter completely. Respectfully submitted.

The Complainant's principal evidence regarding this incident was brought out during cross-examination regarding his earlier testimony suggesting that there had been undue interference by management regarding the preparation of documents affecting him. The relevant exchange between him and counsel for the Respondents is as follows (beginning at number 142 of Side A of Tape 3, for May 8, 1996):

- Q. Mr. McKinnon, you were -- my notes indicate that you stated that staff had altered documents that penalize you, and you made mention of a particular case with Phil James and a letter from or involving Debbie Mattingly. Can you give me something more on that? I don't recall what it was that was altered.
- A. Yes, sir. There was an incident up on the 4B unit and the staff involved each put in their own version as to what had transpired that day. I had filed, like, my concerns with Mr. Don Carter and told him that I felt that it was as a result of my human rights complaint that Mr. James was again targeting me.
- Q. You say you filed your concerns. Are you talking about an occurrence report?
- A. No, sir. He takes notes. It's the informal stage of a grievance to a manager. He writes down what my complaint is. And I had Mr. Derek Miller present with me. And there was supposed to be an investigation. [The meeting in question is that which led to Mr. Carter's report filed as Exhibit 85.]
- Q. What was your concern?
- A. My concern, again, that Mr. James was undermining me, overstepping his boundaries of authority, supervising me in an area that he had no knowledge of the past history. It was a problem unit. There'd been misconduct late in the morning.
- Q. Is that what he didn't know about?
- A. Well, he'd know -- he didn't know about -- I had talked to the manager in charge, Mr. Robert McCann, and Lieutenant Robert Simpson, and felt that a way to get control back in the unit was to turn off the phones, which was the tool that we used to help monitor the inmate population if they become rebellious or -- and there's a directive to that effect from Mr. George Simpson, that if there's any fights or anything that the phones will be turned off for forty-eight hours. A group of inmates had indicated to Mr. James when he was walking by that their phones were turned off and instead of checking with me he started putting in statement forms, the inmates were complaining about me. Again, blowing it out of proportion. Reports submitted by myself, Ms Mattingly, Mr. Don Carter and Mr. Phil James. I couldn't understand -- I forget the time frame, now, sir, but we had -- I had received documents from the Commission indicating that incident, and it didn't reflect what had really happened in Ms Mattingly's report. So I went to Mr. Don Carter, the guy investigating it -- the manager investigating it, sorry -- and I asked if he had done the investigation. He said that he had put his findings forward and that James was going to be talked to, and that he was receiving a lot of heat from managers, in particular, Mr. Phil James's wife and Miss Pat Gill, there was another manager at the facility. When I started asking him questions

about Ms Mattingly's report, he said, "No, no, no, that's not what happened", and he said "I'll bring my file in". He gave me a manilla envelope and it had on it "4B Incident" and I believe it had my name on the front, "McKinnon". And in the envelope he had reports that he had submitted to the Superintendent, a copy of Phil James's, and a copy of Debbie Mattingly's. When I saw Debbie Mattingly's report that he had a copy of, it was a four page report. When we received a copy from the Commission it was a one page report. Both dated and signed at the same date. Both talking about the same incident. ...

Q. Do you have any reason to believe that they were not -- one or the other was not authored by Ms Mattingly?

A. Oh no.

Q. And, you'd agree with me that the subject matter of the longer report is "Re 4B incident" and the other short, one-page, report, is "Issuing of inmates statement forms into 4B unit by OM 14 James"?

A. Yes, sir.

That the box provided at the top of the Centre's occurrence report form in which to describe the "Subject/Nature of Report" was filled in differently on each of her two reports does not establish that they dealt with different matters and, in fact, it is clear that they did not. Ms Mattingly, who has since become a permanent staff member at the Centre, could not remember much about the incident, but she "assumed" that she was asked to write a longer report after submitting the shorter one "that was not specific enough". In cross-examination, Ms Mattingly said that she could not recall who had asked her to prepare a second report, but after looking at Mr. Carter's report (Exhibit 84) she thought that perhaps it had been he. However, as Mr. Carter's evidence makes clear, he did not ask her to do this, and someone other than the investigating officer must have decided that a second report was necessary. As it happens, the order in which they were written cannot be ascertained on the face of these documents because the boxes at the top of the forms in which to insert the time at which a report is written indicates that both were written at 16:30 hours on March 19. Thus, it would appear that these were not supplementary reports, but that one was meant as a substitute for the other, and the shorter of the two reports might actually have been the second one prepared by Ms Mattingly.

I found it significant that during her examination-in-chief Ms Mattingly testified that in seeking Mr. James's intervention she would probably have said: "Sir, can you go talk to the inmates?" While consistent with her statement in the longer version that she "suggested that they should speak to OM14 James", that testimony is inconsistent with her statement in the shorter version that she had "informed him that several inmates on the east side had been asking to speak to him", and it is inconsistent as well as with Mr. James's testimony that she had told him that the inmates were "screaming for him", thus suggesting some dire emergency. And, curiously, when a copy of her occurrence report was sought by the Commission, the one it received was the shorter document lending some support to Mr. James's suggestion of some urgency in the matter, whereas the copy in Mr. Carter's file was the longer report corroborating the thrust of Mr. McKinnon's assertions. Mr. Carter's testimony regarding what appears to have been an unprecedented double reporting of an occurrence in which one report was apparently meant to be a substitute for the other, as distinct from the not unusual making of follow-up reports, was as follows (near the end of Side One of Tape 1 for July 4, 1996, and continuing on Side B):

Q. Now these documents, Mr Carter, relate to -- are occurrence reports regarding an incident on 4B on March 19, 1991. Did you have any involvement either in this incident or in the investigation of this incident?

A. I did. ...

Q. Are you able to offer any explanation to the Board -- are you aware of why there would be two separate reports filed by Ms Mattingly on the same date and time about this incident.

A. No. With the absence of my notes I can't say why she would write and submit two reports. Sometimes supplementary evidence or information is requested, but I wouldn't have an explanation why she would submit two at the same time, same day. ... [Mr. Carter's reports, filed as Exhibits 84 and 85, were then entered and he was given time to read them through before questioning resumed on Side B of the tape.]

Q. Having had the opportunity to review your reports, Mr. Carter, are you able to provide any information to the Board as to why Ms Mattingly might have produced two reports? ...

A. According to that, no. There doesn't appear to be any reason why she would submit two. The report does reflect that she was very upset and concerned that it would have some impact on her classification.

Q. All right. So Ms Mattingly was concerned and upset that day that it would have an impact on her --

A. That writing a report and getting involved in the incident might have an impact on her career. That was her concern.

Q. At the time of this report was Ms Mattingly an unclassified officer?

A. Yes, she was.

Q. And what recommendation did you make to the Superintendent as a result of your involvement?

A. I believe, according to my report, I made a few recommendations, one being that Mr. McKinnon and Mr. James have a roundtable discussion in an attempt to resolve the matter. But I didn't believe at that time it would work. And perhaps an independent investigation by the Ministry would clear the air and resolve the problems

Q. Are you aware of whether any such independent investigation occurred?

A. No, I'm not.

Q. Did you receive any comments from your peers as a result of your recommendations, as a result of your involvement in this incident? ...

A. I was -- no, I didn't receive any direct comments.

Q. Did you -- you didn't receive direct comments -- but could you tell us, did you, ah, hear of any comments or did you have any concerns expressed to you or about you?

A. I heard rumours.

Q. What rumours did you hear?

A. That -- that I had, ah, basically not supported managers.

Ms Doherty was also questioned at length regarding this encounter between the Complainant and one of her managers, and her evidence was supportive of Mr. James and rather critical of Mr. Carter who, rumour seemed to imply, had let the side down in that he had "not supported managers".

Counsel for the Respondents questioned Ms Doherty about the list of errors that Mr. Carter concluded had been made, and she began by saying that she disagreed that "Ms Mattingly directed the wrong supervisor to the 4B unit" since, in her view, any manager on the scene could properly be requested to assist. Clearly, however, Mr. Carter's conclusion was not a generalization inconsistent with the view that circumstances might make it appropriate to seek the assistance of

a supervisor other than the one assigned to the area in question. Rather, he was commenting on the appropriateness of directing some other supervisor to the scene in the specific circumstances of the situation in question.

Ms Doherty was next asked to comment on Mr. Carter's finding that, "not being the unit manager and not aware of the facts", it was an error on Mr. James's part to begin "an investigation into complaints of inmates that may have been answered by Mr. McCann the unit manager at that time if consulted". Her assessment of that conclusion (about two thirds of the way through Side A of Tape 5 for May 27, 1997) was: "Well, Mr. McCann wasn't there. Mr. James was. At some point I would assume he would speak to Mr. McCann. Perhaps the order in which he spoke to him would normally be at the time. It's hard to second guess people. It seemed quite logical".

The suggestion that, because Mr. McCann was not on the scene when Mr. James acted, Mr. Carter is thereby precluded from finding that there ought to have been consultation makes no sense to me. It was Mr. Carter who investigated the matter, not Ms Doherty, and the whole point of his investigation was to assess the situation and present his findings and recommendations. It was precisely his job to "second guess", difficult as that might at times be. Mr. Carter obviously concluded that there was not such urgency as to require Mr. James to take matters into his own hands simply because Mr. McCann was momentarily absent. To reject that finding simply on the basis that "Mr. McCann wasn't there and Mr. James was" is to reduce the investigation to an exercise in futility.

The third error identified by Mr. Carter was that "Mr. James didn't interview all parties involved, to get the whole picture prior to starting his investigation". After putting this to her, counsel asked Ms Doherty: "Are you of the view that interviewing witnesses would not be part of his investigation, or am I missing something here?" Her reply was "No, interviewing witnesses would be part of an investigation". The implication appears to be that as long as all the parties are, as witnesses, eventually interviewed the order in which this is done relative to other aspects of the investigation is immaterial. However, Mr. Carter's point was that, had Mr. James talked to Messrs McCann, Simpson and McKinnon before passing out forms to inmates and encouraging them to fill them out, and scribbling things in the log book quite improperly (as Ms Doherty

acknowledged), he would have discovered that no investigation, by him or anyone else, was required.

In truth, there was no "occurrence" to investigate, nor any need for any reports, until Mr. James precipitated the real incident by his actions. Inmate unhappiness over the legitimate application of discipline is endemic, and it is not *per se* a matter requiring investigation. It was Mr. James's duty first and foremost to look into the legitimacy of the discipline before embarking on an "investigation" by providing to the inmates forms they did not request, encouraging them to make use of them, and then writing in the log book (untruthfully, I think) that they were all complaining about the Complainant who had merely carried out a decision approved by his floor and shift supervisors. To appreciate that this is so, one has only to consider what would have happened had Mr. James gone to see Mr. McCann first. In that event, he would have been told that after consultation with the shift supervisor it had been agreed by them that the Complainant should be directed to suspend the inmates' phone privileges for disciplinary purposes. Suppose Mr. James had then said, "Well, they don't like it, and although I'm just passing through the unit on a break from my duties elsewhere, I'm going to conduct an investigation. I'll want your report, along with those of McKinnon, Mattingly, and the shift supervisor, and I'll look at those in due course along with all the complaint forms I intend to pass out to the inmates." Such an unthinkable posture on his part makes abundantly plain the need for preliminary inquiries amongst colleagues in order to avert bogus or unnecessary "investigations". Ms Doherty's defence of him and disavowal of Mr. Carter begs the question as to whether there was anything for Mr. James to investigate.

The final error listed by Mr. Carter upon which Ms Doherty was asked to comment was his finding that "the communication between Mr. James and the Complainant was not clear and as a result this may have fanned the flames in this incident. It is quite clear to me that a problem exists between Mr. James and the Complainant for what ever reason and it is directly affecting their ability to work together". Although the lack of volume, the pitch of her voice and the rustling of papers makes it difficult to tell from the audio tape exactly what she said, she appears to have responded as follows:

I think Mr. Carter's kind of jumped and kind of over-reacting. Like, I think it's important that [unintelligible]. Like, what were the inmates' complaints. Mr.

James was only trying to find that out to deal with the matter and all of a sudden Mr. Carter's jumping to the conclusion that there's a problem between Mr. McKinnon and Mr. James.

In light of his report of the same date (Exhibit 85) dealing with a grievance of harassment brought by the Complainant and his union representative and making reference to the Complainant's human rights complaint against Mr. James, it seems to me rather astonishing that she would characterize Mr. Carter's finding that there was a problem between these two men as "jumping to conclusions". Indeed, he had understated the situation, as she knew, or ought to have known, since (as she went on to testify) she was already aware of the Complainant's human rights complaints.

Asked what her response had been to Mr. Carter's suggestion that: "The final solution may be an investigation into this matter or claims by the Complainant by a Ministry Investigator which would conclude this matter completely", Ms Doherty replied: "Well, I didn't think it warranted". And so, on March 26, 1991, she closed the books on the incident by writing the following memorandum "to file only" (Exhibit 211):

Following the complaint of Mr. McKinnon, I conducted a full investigation.

I find that no harassment occurred in this situation.

There was a note in the 4B log book made by Sgt. James indicating that several inmates had made a complaint against Mr. McKinnon. This was not the place to write a comment about a staff member. The more appropriate place would have been in a fact file. The log book was immediately removed from use.

I also found that the officer working with Mr. McKinnon has asked Sgt. James to deal with a problem on the unit. Mr. James was not assigned to that unit, but as a manager, when asked to provide assistance should indeed respond. The allegation from inmates was that C.O.2 McKinnon was treating them unfairly and intimidating them. The inmates told Sgt. James that they were afraid of C.O.2 McKinnon and did not want any repercussions if they complained.

In my opinion, Mr. McKinnon definitely has a very negative opinion of Sgt. James. He has previously lodged a Human Rights complaint against Sgt. James which certainly clouds his vision when coming into contact with Sgt. James.

I intend to take no further action on this matter. The log book will remain out of service.

There was no evidence of any investigation by Ms Doherty personally, or through any members of her staff, of the Complainant's "complaint", that is to say of his harassment grievance that was the subject of Mr. Carter's report filed as Exhibit 85, which we were given to understand the Ministry and the Union have agreed will be held in abeyance pending the resolution of these human rights complaints. Mr. Carter did not investigate the complaint, he merely recorded it and passed it on to the superintendent. There was, of course, an investigation by Mr. Carter of the 4B incident that gave rise to that complaint, and one must suppose that if questioned about it Ms Doherty would say that that was the investigation to which she was referring. Yet, while her memorandum impliedly rests on the results of that investigation, not only were Mr. Carter's findings rejected by her, but she could not recall speaking about the matter with any of the persons involved, and there is no reason to think that she would have. However, that did not deter her from substituting her unfounded conclusions for those of the investigating officer and passing them off as the distillation of a "full investigation" – perhaps, one might be led to assume, the kind of investigation Mr. Carter recommended and that she testified she "didn't think it warranted".

I find it highly improper of Ms Doherty to have included in a document hidden from the attention of those affected by it, but filed away for some possible future purpose (such as in relation to the pending grievance hearing), the statement that: "The allegation from inmates was that CO2 McKinnon was treating them unfairly and intimidating them. The inmates told Sgt. James that they were afraid of CO2 McKinnon and did not want any repercussions if they complained". While this does not purport to be a finding by her that the Complainant unfairly treated and intimidated inmates, it is a clear averment that this is in fact what the inmates told Mr. James, that such was the nature of their complaint. However, not only was his assertion to that effect uncorroborated but, *ex facie*, Ms Doherty's statement is nonsense and totally inconsistent with the facts, as she knew or ought to have known.

I suppose it is conceivable that inmates might come to have some special trust and respect for some particular officer in whom they might therefore be willing to confide their fear of another officer regarding whom they are loathe to complain for fear of unpleasant consequences. (Of course, there was no evidence that Mr. James had attained such a position of pre-eminent trust

amongst the inmates.) In that case, however, their purpose would be either to obtain relief from a specific action of the disliked officer without alerting him, or else to secure his removal from contact with them (as surely any inmate would have known to be a virtual impossibility). Obviously, if the inmates "did not want any repercussions if they complained" they would have kept their own counsel or urged confidentiality. They certainly would neither have expected nor wanted the flurry of activity involving the distribution of complaint forms guaranteeing, *ex hypothesi*, future repercussions at the hands of the redoubtable Complainant.

Ms Mattingly's four page report of the incident indicates that the inmates had been obstreperous, using foul language and misconducting themselves towards both her and the Complainant, and that one of them brazenly refused the Complainant's order to return to his cell and simply stood there staring him down, thereby demonstrating the extent to which the Complainant's intimidation technique needs improvement. In fact, the inmates' complaint was not about the Complainant's allegedly coercive manner at all, but about the loss of telephone privileges, in removing which the Complainant was acting in accordance with the decision of the floor manager concurred in by the shift manager. Moreover, only one inmate complaint form was filed (Exhibit 119), and it does not mention the Complainant by name, nor does it recite any facts indicating any form of intimidation or the fear of repercussions. Not surprisingly, of course, it did complain of unfairness, but this was confined to the decision to disconnect the telephones, which, in fact, was not made unilaterally by the Complainant.

Not only was Mr. James's assertion as to the nature of the inmates' complaint inconsistent with the evidence of everyone else, but it is so clearly untenable on its face that Ms Doherty, who was privy to all of this information, either knew or ought to have known that this paragraph of her memorandum "to file only" was false. Instead of stating what she knew to have been true, namely, that: "The allegation from inmates was that the telephones had been unfairly turned off", she insinuated into this document the deceptive and damning assertion that the inmates regard the Complainant as a vengeful bully.

The penultimate paragraph of Ms Doherty's memorandum is gratuitous and makes clear the bias suggested by the false assertion that precedes it. (It is also reminiscent of Mr. Hume's cautioning

of the Complainant, but not of Mr. James, about carrying on his duties in a professional manner.) Her opinion that the Complainant "definitely has a very low opinion of Sgt. James" may coincidentally be valid; but the context in which it is expressed implies that it is both unreasonable and unreciprocated. As to the former, one might ask, who could blame him? And as to the latter, one may wonder what opinion she entertained as to the opinion Mr. James had of the Complainant. But, more important, unlike Mr. Carter's entirely neutral observation, her lop-sided assertion that his having "previously lodged a Human Rights complaint against Sgt. James certainly clouds his vision when coming into contact with Sgt. James" is not borne out by any of the facts involved in the incident in question. Not only was it unfounded, but it is unfair, highly prejudicial and inconsistent with other aspects of her testimony, and at best stereotypical of human rights Complainants whom she thereby appears to consider incapable of appropriate behaviour when coming into contact with those they have accused. By way of contrast, the absence of any similar observation regarding Mr. James's state of mind suggests that she believes that Respondents to human rights complaints remain unmoved by such encounters, bringing to bear when dealing with their accusers a vision unsullied by what divides them. The ultimate irony is that the Complainant did not instigate the incident; Mr. James did.

As to the advisability of separating the work assignments of these antagonists where possible as suggested by Mr. Carter, it is to be noted that Ms Doherty had written a memorandum to Mr. Small on March 5, 1991, advising him that, in accordance with her decision made at the Complainant's request, he should inform the shift supervisors and scheduling officers not to assign the Complainant to a post where he would come under Mr. Geswaldo's supervision (Exhibit 115). And then on March 18, 1991, the day before the 4B incident, she wrote to the Complainant as follows (Exhibit 217):

Subject: Human Rights Complaint

At your request, I recently instructed Mr. S. Small to assign you to posts that would reduce your contact with Mr. Geswaldo.

I agreed to take this action until your Human Rights complaint is heard. I do not recall discussing Mr. James in relation to your complaint.

Under cross-examination she could not recall why she wrote that letter to the Complainant, but she agreed with counsel's suggestion that it was probably because, upon receiving his copy of the memorandum to Mr. Small, the Complainant had gone to see her as to why the same arrangement had not been made regarding Mr. James. This, in turn, suggests that he had reason to believe that it had been raised, if not in fact resolved, in their earlier meeting. She also acknowledged under cross-examination that she must have been aware the day before the 4B incident that the Complainant did not want to work under Mr. James's supervision.

In any case, despite her conclusion that the Complainant's vision is clouded when he comes into contact with Mr. James and its implication that it was this that had most probably occasioned the 4B incident, Ms Doherty maintained that she could see no reason why she should have removed the one from the supervision of the other as recommended by a report ostensibly relied on for the purpose of her memorandum, but actually rejected for the disposition of the matter. However, while adamantly of the view that there was no reason to follow that recommendation, in the end Ms Doherty was unable to give any reason why she decided, on the one hand, that Mr. Geswaldo should not supervise the Complainant yet, on the other, that his request that Mr. James not supervise him should be denied.

The inferences I draw from the evidence regarding the 4B incident begin with my finding that it was Ms Mattingly's inexperience that caused her to seek to avert the inmates' hostility by finding someone senior to talk to them and that, seeing Mr. James enter the area, she said something to him very like: "Sir, can you go talk to the inmates?" After talking to them long enough to gather that the Complainant was implicated in the circumstances of their ire, Mr. James, by then a named Respondent in these human rights complaints, used the occasion to create more problems for the Complainant. I do not share Mr. Carter's generous assumption that Mr. James's intentions were benevolent and that he was conscientiously going to the aid of a "peer". Ms Mattingly was not his "peer", and Mr. McCann neither needed nor requested assistance. Mr. James could have allayed the unease that prompted Ms Mattingly to ask him to speak to the inmates simply by advising them that he would seek out Mr. McCann and tell him of their concerns. Instead, he chose to lend an eager ear to their complaints, to distribute forms on which they could vent them further, to maliciously write the Complainant up in the log book where such notations (even if true) did not

belong, and generally to meddle in a situation which, if he had but inquired of those really in charge, he would have seen to have been well in hand. In order to satisfy his personal agenda, and against all common sense in the circumstances, Mr. James by-passed not only the Complainant, but the floor and shift supervisors as well; and in the end, and quite predictably, he did not help Ms Mattingly but, rather, immersed her in a situation that later brought her to tears (see Exhibit 84).

It was because the Complainant viewed the 4B incident in the context of his human rights complaints against the Respondents, in general, and Mr. James, in particular that, accompanied by Mr. Derek Miller, his union representative, he approached Mr. Carter regarding that aspect of the matter in order to present a verbal grievance of harassment by Mr. James. This led to Mr. Carter's report to Superintendent Doherty that has been filed as Exhibit 85. That report, together with Exhibit 84, plainly indicates the unbridgeable hostility between Mr James and the Complainant. The two documents served to provide the Superintendent with clear notice of a situation she ought to have dealt with in a just and expedient fashion. Any objective reading of Mr. Carter's first report would lead to the conclusion that Mr. James was in the wrong regarding this incident and, if it were not already known to all the senior management, his second report showed Mr. James to be a Respondent in human rights proceedings initiated by the Complainant. Yet, as became the Complainant's refrain in argument, "management again did nothing".

The recommended and obviously fair interim solution that these parties be kept apart as well as the recommendation that an independent investigation of the incident be conducted were ignored. Instead, with full knowledge that Mr. James, who had been revealed to have wrongfully instigated the episode, was the Respondent in a human rights complaint lodged by the Complainant, and despite the clear link between that conduct (which resulted in the filing of a harassment grievance) and the ongoing human rights process, Ms Doherty chose to whitewash this Respondent and denigrate the Complainant. The refusal to properly investigate the grievance *per se* and the taking of sides in this manner was such as to support or advance the position of this Respondent in the context of the human rights complaint brought against him for discrimination and harassment on the basis of race, ancestry and ethnic origin and this, in my opinion, amounts to indirect discrimination on the same basis. Of course, no liability attaches to this conduct because it is not

a part of either of the complaints with which I am seized. However, it is very cogent similar fact evidence regarding the kinds of management practices for which the corporate Respondent is answerable, and it is relevant as well with respect to the issue of the workplace environment.

Another matter raised in the Complainant's third human rights complaint that the Respondents chose to pursue concerned his failure to obtain a temporary assignment as a rehabilitation officer following a competition held in 1990. The circumstances in question are described in that document as follows:

4. On or about August 30, 1990, I applied for a temporary assignment as Rehabilitation Officer 2, by way of a letter asking that I be considered.
5. I was not contacted further concerning my request until on September 10, 1990, by letter from D. Mikel, Social Programs Administrator, I was advised that I had not been selected for the assignment.
6. On September 11, 1990, I wrote to Supt. D. Doherty to ask that I be advised of the criteria and process used to select the successful applicant and on what basis I had been rejected.
7. On September 13, 1990, I received a memo from Supt. D. Doherty advising me that the assignment was being offered to employees who had not previously had a developmental assignment, for one month each. She claimed that I was not chosen because I had previously had a developmental assignment, although not in a rehabilitation position.
8. The three employees offered the position, Ms Miller, Mr. Laroque, and Ms Besenyo, all had substantially less seniority and experience than I had. In particular Ms Besenyo had less than one year's service.
9. I am familiar with the requirements of this position, and feel that I am well qualified to perform the job.
10. I have since been advised that the other applicants were selected because of superior educational qualifications. The position required a Grade 12 diploma, which I have obtained.

The competition for the position in question was announced on August 24, 1990, by way of a short memorandum addressed to "All Staff" and "inviting applicants to fill this position on a

temporary assignment until the position can be filled" (see Exhibit 213). Applications were required to be submitted to her by the end of the month. While that memorandum did not set out the qualifications required, the "Position Specification and Class Allocation" form (filed as Exhibit 167) describes the purpose of the position (at times referred to in testimony by its former title of "classification officer") as being "to administer the temporary absence and classification program at the Toronto East Detention Centre", and it goes on to indicate that the "Skills and knowledge required to perform job at full working level" are:

Very good knowledge of legislation and Ministry policy/procedures relating to T.A. and classification; good knowledge of community agencies; good interviewing skills; ability to deal effectively with inmates, staff, professionals, justice officials and the public; good communication skills.

The Complainant responded to Ms Doherty's invitation on August 28 with a short note stating simply that: "This is to request consideration for the position of temporary Rehabilitation Officer as per your memo of August 24th, 1990." (Exhibit 214.) The Complainant attached no supporting documentation because none had been solicited, leading him to expect that relevant information regarding the candidates would be gleaned from their personnel files. Upon receipt of Mr. Mikel's memorandum of September 10 advising him that he had not been successful (Exhibit 237), the Complainant wrote to Ms Doherty on September 11 requesting "written feedback of the criteria used to select the successful applicants and upon what basis my application was rejected". (Exhibit 238.) Ms Doherty replied by memorandum on September 13 (Exhibit 215) as follows:

One of the main criteria used to fill the temporary rehabilitation officer position, was to provide a developmental opportunity to those staff who have previously not had that opportunity.

To be as fair as possible and to provide the opportunity to as many as possible we decided to provide the developmental opportunity for individuals one month at a time.

You were not chosen as you have previously had a developmental assignment, not in the rehabilitation position, but in another area.

A board consisting of the Social Programs Administrator, the Senior Assistant Superintendent Corrections and myself reviewed all applicants.

The Complainant was dissatisfied with this response and, on September 28, he filed a grievance (presently held in abeyance along with others pending the outcome of this case) alleging that "management has exercised its rights in an unfair and discriminatory manner by denying me a temporary rehabilitation officer assignment". (Exhibit 216.) Management's denial of that grievance at the Step 1 level was conveyed to the Complainant both by Mr. Carter, in his memorandum of October 2, 1990, and by Mr. Cooley, the Regional Manager of the Metro Region, in a letter dated November 21, 1990, which documents were entered as parts of Exhibit 216. In the final paragraph of his letter, the significance of which remains to be seen, Mr. Cooley states that:

Having reviewed all the evidence and your decision not to accept a one-month developmental opportunity as a rehabilitation officer which was offered to you, your grievance is denied.

The principal evidence regarding this particular competition was provided by Mr. Mikel, the Social Programs Administrator in whose department the position was located. He explained the decision to fill the vacated full-time rehabilitation officer position temporarily with three consecutive one-month appointments, and the criteria to be used for that purpose, as follows (beginning at number 468 of Side A of Tape 1 for September 2, 1997):

Well, we were most interested in finding people who had good written skills -- good writing skills -- and, uh, you know, experience in the system, you know, because much of the classification counsellor's job is writing reports. And we were also interested in perhaps giving people who hadn't had opportunities an opportunity in a, in a, you know, to do something different, to broaden their -- to broaden their experience. We had done it a little bit differently in that before we had used -- usually taken one candidate -- if we had three months that we needed somebody we -- we had normally taken one candidate to do three months. But we were trying to train a number of people so that when we had vacancies or people away sick, you know, or whatever, we'd have several people to choose from to plug into classification. So that's why we decided to give three people one month secondments so that we could train them in classification.

Q. And why were good writing skills important? What was essentially the end product of the work effort if they were in that position?

A. Well, it's an assessment, it's a written assessment of individuals' security treatment and program needs, and the purpose of these particular assessments is to recommend placements in our system for inmates who have been

sentenced. So it's fairly important that, you know, that people be able to articulate the reasons for their placement recommendations and to be able to describe somebody's program and treatment and the agenda of security needs, their involvement in our system, and that sort of thing.

The Complainant and his wife, Vicki Shaw-McKinnon, were amongst the eight applicants for these three temporary postings, the successful candidates having been Janet Miller, Paul Laroque and Jadwiga Besenyo. According to Mr. Mikel, Ms Miller had a B.A. degree, but had had no previous acting assignment "that I recall". He did not "believe" that Mr. Laroque, who spoke French, had had any prior acting assignment, and he thought that he had "a community college background, if I'm not mistaken". Ms Besenyo, who had apparently been in the Ministry less than a year, had attached to her application a résumé which indicated that she held a B.A. degree, was expecting a B.Ed degree, and was proficient in English, French, Italian and Polish. (Exhibit 236.) Mr. Mikel appears to have ascribed no importance to post secondary education other than the odd notion that the more one has of it the more likely is one to be multilingual, the importance of which he explained as follows (at number 25, Side A, Tape 1, for September 2, 1997):

... And I felt that those were, you know, would be important assets for the job and for the department. The educational thing was important from the standpoint that we quite often had people with various -- who had various cultural backgrounds who couldn't speak English, or didn't speak English as a first language, and we had problems in classification because it was important that we get people's information correctly, and finding interpreters and setting up times and all the rest of it, so having people who could speak different languages in the department was an asset.

Mr. Mikel testified that the impending departure of the incumbent left no time to conduct interviews and that he had relied exclusively on the "paper work" -- the documents submitted by candidates together with the staff files to which he had access for the purpose. Under cross-examination he acknowledged that there was nothing in Ms Doherty's memorandum "indicating to people that they should apply with anything other than a memo," or that they should draw to management's attention their language skills or educational background. He also admitted that, according to the "Position Specification" form, the skills and knowledge required to perform the job did not indicate either that a second language would be an asset, or that any post-secondary education was required, and he agreed when it was put to him that "it's fair to say then that the

people who applied, seven or eight people who applied for these positions, were unaware that you'd be looking at post-secondary education or language skills". Neither the Complainant nor his wife was asked by Mr. Mikel about their language skills or educational background, and he was unaware either that the Complainant had a community college diploma, or that Ms Shaw-McKinnon had studied at Queen's university and had had extensive experience as a French and Spanish interpreter in the Centre.

Mr. Mikel agreed that he saw "the importance of report-writing, written communications skills and experience in the system as the key things that are crucial to this position to allow people to do their job". That these are the proper criteria is, of course, underscored by the job specification form which, while silent as to education and second language ability, expressly requires "good knowledge of community agencies [and] good interviewing skills; ability to deal effectively with inmates, staff, professionals, justice officials and the public; good communication skills". These stated requirements seem to stress skills more likely to be gained through on-the-job training and experience than by a post-secondary education that does not in and of itself constitute proof of the attainment of the qualifications required. Thus, Mr. Mikel's admission appears to recognize the considerable relevance of seniority while relegating to a position of secondary importance such matters as second language skills, the extent of previous opportunities for developmental assignments and post-secondary education.

For purposes of comparison, Mr. Mikel's attention was drawn to Ms Besenyo's résumé, which contains some discursive material that he conceded contained "grammatical and/or syntax errors". Had he examined the Complainant's staff file Mr. Mikel would have discovered that his performance appraisals in respect of written communication skills indicate (depending on the forms used) that he was consistently exceptional or that his performance ranged from commendable to excellent. However, whether Mr. Mikel was aware of this at the time the decision was taken is unclear. While he admitted that staff files contain appraisal reports, he said: "I can't remember what was in the files, *or if I looked in the files*. I'm just trying to recall what I might have done" (emphasis added).

Surely it would have been grossly unfair in the circumstances to have had regard only to the unsolicited accompanying documentation of some candidates while ignoring relevant information regarding them all that was readily available in the staff files. Thus, it would seem that Mr. Mikel was either remiss in his obligation to examine all relevant information, or that he decided to override the primary criteria in order to select the inexperienced Ms Besenyo (on the basis of her apparent linguistic talent and more extensive, but unnecessary, post-secondary education), along with the apparently unilingual Ms Miller (who had a B.A. degree but less experience than the McKinnons) as well as Mr. Laroque (whose qualifications were inferior to Ms Shaw-McKinnon in all respects reported by Mr. Mikel, and whose experience was less, and education no greater, than that of the Complainant). In any case, when asked by counsel for the Complainant whether he would agree that the Complainant had been qualified to perform the functions of a rehabilitation officer on a temporary basis, he replied: "Probably. Yes."

It is clear from the evidence of both Mr. Mikel and Ms Doherty that, while she had the ultimate authority, the decision as to the successful candidates had been left up to him. When asked who had made the decision, he replied (at number 55 of Side A of Tape 4 for September 2, 1997) that:

... it was probably me in consultation. I just can't recall. It would be me that would be saying who I felt would be the most useful for the position from the information that I had. I mean the Superintendent has the final authority, but quite often, you know, in matters like this, and especially with a new Superintendent, you know, they would certainly, uh, you know, consider very strongly what is being said.

Before posting her memorandum notifying the staff of the Centre of the availability of a temporary rehabilitation officer position, Ms Doherty approached the union local, of which she knew the Complainant was the vice-president, with a request to fill the position with a manager on a temporary basis. Having been unsuccessful in that regard, she posted her notice of the competition and assigned to Mr. Mikel the task of selecting the successful candidate. However, she testified that he consulted with her regarding the criteria, and that she had indicated to him that she "hoped he would also take into consideration that such an opportunity should be given to someone who hadn't had a previous opportunity." Accordingly, Mr. Mikel chose the successful candidates subject to her *pro forma* approval. She said that Mr. Mikel: "came to me, I remember

he came to me, he had successful candidates, and he told me that the chosen candidates met some of those criteria: education, language skills, they hadn't had a past opportunity to do the temporary assignment previously".

While Mr. Mikel's evidence shows that the absence of prior opportunities for developmental assignments was not first and foremost amongst the criteria employed by him, both in her direct evidence and in her memorandum of September 13, 1990, Ms Doherty indicated that the reason the Complainant was unsuccessful in obtaining one of the temporary rehabilitation officer assignments was that he had had previous developmental assignments, leading one to assume that the successful candidates had not. However, in reply the Complainant testified that he had personal knowledge that Ms Miller and Mr. Laroque had had previous acting assignments, and under cross-examination, as the following exchange between her and counsel for the Complainant shows (about half way through Side A of Tape 3 for August 29, 1997), Ms Doherty admitted as much:

Q. Have you any knowledge of Ms Shaw-McKinnon ever previously performing the duties of a, ah -- or having the opportunity to do a temporary assignment as a rehabilitation officer?

A. I believe she had previous temporary assignments, but I do not recall doing what.

Q. Ms Shaw-McKinnon didn't have any acting assignments during your tenure. Are you aware that Ms Shaw-McKinnon had more seniority than the individuals ultimately selected for those positions?

A. No, I am not.

Q. And among the people who were successful, some of those people would have had other acting assignments, just not in the area of rehabilitation officer, is that correct?

A. That's true. When I, when I [unintelligible] competition occurred I was very new at the institution. I knew none of the candidates. I developed the criteria with Mr. Mikel. He took care of it and recommended to me people who he thought should be the successful candidates for the temporary assignment and I said "fine".

Q. So your recollection's then that Mr. Mikel actually made the decision. You simply approved it.

A. [Inaudible affirmation.]

Ms Doherty was questioned by counsel for the Respondents regarding the allegation made in Mr. Cooley's letter to the effect that the Complainant had turned down an offer of a one-month temporary assignment as a rehabilitation officer. Her testimony in that regard is as follows (at number 190 of Side A of Tape 1 for May 29, 1997):

Q. And maybe you can assist us as to what it was that occurred, that gave rise to that?

A. Well, there was a discretionary need as to how we could resolve this grievance and I felt that if Mr. McKinnon -- I felt that the practice was fair -- it's management's right to assign. Therefore we didn't really have to hold any kind of a competition. We could have just appointed somebody for a temporary assignment, or a number of people, in that position until we had an [unintelligible] competition, or a formal competition to fill the job permanently. So, -- I was new to the institution in the summer of 1990. I didn't know really any of the staff. We discussed posting a notice to invite applicants, which I felt was a fair process. I wasn't aware that Mr. McKinnon had a real desire for this position. I felt that if he wanted to have an opportunity to do it, that was fine. So in order to resolve the grievance I agreed to offer him an opportunity to do this rehabilitation officer position for a month.

Q. And would you have met with Mr. McKinnon?

A. I don't recall. I may have been the assistant to Mr. Cooley when he heard the grievance. I don't remember.

Q. In any event, Mr. Cooley reports that, at least it would appear that, Mr. McKinnon was not willing to accept the offer. Is that your understanding?

A. Yah.

Q. Do you have any understanding as to why he would not?

A. No, I don't recall.

The Respondents appear to have focussed on this matter in order to show that the Complainant's refusal to accept management's offer of an assignment of the very kind he complained of having been denied demonstrates his unreasonableness. His position, however, seems quite understandable to me, whereas that of management does not. The essence of the Complainant's grievance was not his failure to get the assignment, but rather *the reason why* he failed to get it. The matter he wanted to have redressed was his perception that once again he had been the victim of discrimination. Under the heading "Settlement Desired" in his grievance form he stipulated,

inter alia, that he wanted to have "a joint policy on temporary assignment developed between management and union". This was unacceptable to Ms Doherty, and her *ex post facto* offer of such an assignment failed to address either that aspect of the matter, or any of the other issues raised by him in his grievance.

In view of Ms Doherty's statement that she "agreed" (and obviously not with the Complainant) to make the offer in question, it would seem that the initiative came from elsewhere (such as, perhaps, the regional manager's office) as an attempt at damage control. In any event, the Complainant's rejection of that offer strikes me as a principled response to an almost tacit admission of fault. Unless management planned to renege on its decision regarding one of the three "successful" candidates, and there being no suggestion that a similar offer had been made to any of the other unsuccessful candidates (certainly, none was made to Ms Shaw-McKinnon), it would seem that management was prepared to create a supernumerary temporary assignment to be offered to the Complainant and to no one else. Why? Ms Doherty's rationalization makes no sense to me. Her astounding statement that she "wasn't aware that the Complainant had a real desire for this position" suggests a failure to appreciate that the reason people apply for positions is that they want them. Was she similarly unaware that the other seven candidates had a real desire for the position? Since at one point she said that she was new to the institution and knew none of the candidates, she had no more reason to assume that the Complainant's "desire for the position" was less real than that of any of the others. In any case, upon discovering to her apparent surprise that he seemed to have a real desire for the position for which he had applied she "felt that if he wanted to have an opportunity to do it, that was fine." The suggestion seems to be that to demonstrate a real desire for a position one must grieve its denial in which case, on the basis of some squeaky-wheel principle, it will be forthcoming. Thus, "in order to resolve the grievance" she "agreed [with whom we know not] to offer him an opportunity to do this rehabilitation officer position for a month."

In the circumstances, it would appear that the competition for the temporary rehabilitation officer assignments was either incompetently or unfairly administered, with the result that the candidates who best met the prescribed, and the only published, criteria appear to have been either carelessly

overlooked or intentionally ignored. However, incompetence does not bespeak discriminatory or retaliatory conduct; and, assuming there was intentional unfairness, that it was motivated by considerations inimical to the *Code* could only be inferred from the bare fact (if it is a fact) that the best qualified candidates were not chosen, whereas, having regard to his position as its vice-president, the refusal of the union local to allow the appointment of managers to a unionized position provides an alternative motive. In any case, Ms Doherty was new to the institution while Mr. Mikel had been there only a matter of months, and there was nothing to suggest that in September of 1990 either of them was inspired by racist motives, or that Ms Doherty was willing to countenance or cover up the racist behaviour of her under-managers.

Counsel for the Complainant urged me to draw the inference that the McKinnons were "denied these assignments because of the fact that the Complainant had filed his human rights complaint". In my opinion, however, the circumstances are as consistent with incompetence as with impropriety, the motivation for which is in any case unclear. Thus, in my opinion, the evidence does not on balance support an inference that the selection of other candidates was the result of discrimination or reprisal against the McKinnons contrary to any of the provisions of the *Code*, which finding would have bolstered the "poisoned environment" allegation but could not, of course, have gone to the issue of liability in any event. On the other hand, if the Respondents introduced the matter of this competition in order to demonstrate the Complainant's unreasonableness and to cast doubt on the rest of his assertions, they have failed in that regard. In my view, such a contention is simply not tenable.

6. Similar Fact Evidence and Other Relevant Post-Complaint Circumstances

Prior to dealing with similar fact evidence regarding allegations of racial discrimination and harassment directed against others in the Centre, some of which pre-date the third complaint, counsel for the Complainant turned to those incidents following that complaint, beginning in January of 1992, that in his submission reveal a poisoned workplace environment. I find it convenient to deal with these remaining matters in the same sequence, starting with the misuse of the Ministry's province-wide computer system for defamatory purposes. Before doing so, however, I would note that, except insofar as Mr. Geswaldo and Mr. James testified against the

Complainant in the Vince Daley matter seen earlier in another connection, none of the individual Respondents played an active part in any of these post-third-complaint episodes. Messrs Simpson, Hume and James had left the Centre prior to these events, and Mr. Geswaldo was away from work during this period for a very substantial length of time owing to injuries.

The Ministry operates a computer database system known as the Offender Management System ("OMS") which can be accessed for official purposes through the use of personal codes (known as "userids") that identify and enable the tracing of those who access the working database. However, during the period in question there were some general, or common, "userids" enabling anyone in a position to use one of the Ministry's computers to gain access to the training database in the evenings or on weekends. Apparently the use of the OMS training database for unauthorized personal purposes had been rather commonplace at one time, and various messages were sent and received by replacing inmates' names with Code names and entering the text under the "marks and scars" section of the blank document called up on the monitor screen for such purposes.

On January 5, 1992, Ms Rennie, while working as a correctional officer in the 3A unit, accessed that programme and, according to her occurrence report filed the next day (Exhibit 35), she saw a message which she erased, along with the line through which she had accessed it, in order "to avoid further slander". She reported the message to have been as follows:

HI MR. MCKINNON --- SEE YOU IN COURT --- HOW ARE THINGS AT THE
EAST --- IS YOUR WIFE STILL SEEING A BLACK MAN --- DEAL WITH YOUR
OWN PROBLEMS AT THE EAST OR FACE THE BEAST.

Ms Snow, another correctional officer working that shift with Ms Rennie, also filed an occurrence report (Exhibit 36) in which she indicated that it had been brought to her attention that someone using the Code name "Cockmeister" had sent a message to "Coldfire" (a Code name her report said the message attributed to the Complainant), which message "supposedly had asked if his wife was fucking a black man and he would see him in court." Ms Snow concluded her occurrence report by noting that: "I never saw the message, but I did bring it to Mr. McKinnon's attention."

Having been thus informed, the Complainant went to see Mr. Hill for whose benefit Ms Rennie was called upon to demonstrate the retrieval steps which were predictably unsuccessful since the message had been deleted and written over. Mr. Hill promised an investigation, as did Ms Doherty with whom the Complainant spoke as well. It is apparent from the full day's testimony of Mr. Hill in that regard, as well as from that of Ms Doherty, and from the ten exhibits filed by the Respondents, that an investigation into this matter was conducted, and what is at issue is the Complainant's perception that by reason of culpable indifference it was too little, too late.

It was submitted on the Complainant's behalf that the evidence discloses that management's efforts to discover the author of the offensive message were inadequate in that Ms Doherty failed to follow up on a possibility raised in a memorandum sent to her on February 4, 1992, by Ms Banks, the Supervisor of Records (Exhibit 130), namely, that:

Tracking a userid is possible by a report. It is only available via the Superintendent requesting in writing, reasons etc. There are several concerns MISB have with responding to such a request.

Counsel's position was that, because there was no evidence that Ms Doherty had made the request referred to, the efforts of management were so woefully insufficient as to warrant an inference of indifference to the racial harassment implicit in the occurrence. However, the evidence does not suggest to me that the defamatory message had been entered into the system by way of its author's unique user code but, rather, that resort was had to the general access code that could not be used to identify the culprit with any degree of certainty anyway. That being so, I take Ms Bank's statement to be a reference to individual "userids", the tracking of which would require a special request, rather than to general "userids" which cannot be traced to an authorized user.

It was also urged upon me that management's efforts to find and punish the person responsible for publishing this defamatory and racist message were less than enthusiastic because of the unfounded assumption of Mr. Hill, who was charged with conducting the investigation, that the Complainant had entered the comments into the system himself in order to further his human rights complaints. In his handwritten memorandum to Ms Doherty of January 12, 1992 (Exhibit

131), in respect of "the Complainant's complaint of 'unwelcome' comments" on the OMS system, Mr. Hill says:

I have reason to believe that Mr. McKinnon along with another person using the nom-de-plume of COLDFIRE put a message on the SFOOPB system [for "Secret Fraternal Order of Provincial Buckets" by which the message system was known and accessed] on 3rd Jan 1992. And the contents of C.O. Rennie C.O.Snow occurrence reports showed up on Sunday 5th Jan 1992 from BIGBUBBA whom I believe is C.O. Moreau at Barrie Jail.

The purpose of this is to kindle his case of establishing a poisoned environment at the M.T.E.D.C.

While I agree with counsel that there was no evidence to support Mr. Hill's hypothesis, which the Complainant found outrageous, by this time the principals involved in this affair shared neither trust nor goodwill, and there was no evidence to show that Mr. Hill's suggestion was intentionally false rather than somewhat paranoid. Counsel went on to argue (at number 34, Side A, Tape 1) that Mr. Hill's memorandum:

... demonstrates the mind-set of management towards Mr. McKinnon by this point in time - that the notion of him being scheming and plotting, and instead of, instead of looking for culprits to try to do anything about it, I think that that coloured the non-investigation ... Nothing was done, and I ask you to draw the presumption from that that it was because it [the defamation] was directed at Mr. McKinnon and that management was unwilling and uninterested in addressing it.

I take a different view of the matter. It seems to me that if Mr. Hill had believed that the Complainant was the author of the "unwelcome" comments such a suspicion would have had the opposite effect. Surely it would have driven him to press his investigation with renewed vigour in order to unmask the culprit in the confident expectation that it would be the Complainant who would be revealed. It was not suggested in argument that Mr. Hill had knowingly presented a false hypothesis to Ms Doherty by way of this internal memorandum in order to mislead her, a notion that would seem to defy common sense. Such a tactic would certainly not have served to end or slow down the investigation as counsel suggests Mr. Hill was inclined to do since, if it

were given any credence it would have the opposite effect, and if it were seen for what it was it would have no effect.

While the placing of the message in the computer was reprehensible conduct of a racist kind occurring in the Complainant's workplace, the evidence shows clearly that management did not condone it, that reasonable steps were taken to discover its perpetrator, that the occurrence was publicly denounced, and that (although there had been a previous instance involving someone else) access to the OMS system by general "userids" was finally discontinued in order to prevent repetition of such behaviour, the delay in doing so having been attributable to inadequacies in the province-wide system for which the Centre was not to blame. Thus, in my view, management cannot be faulted in this instance.

Next in the series of circumstances dealt with by counsel for the Complainant was the conduct of Messrs Ellis and Melville referred to in a June 8, 1992, memorandum received by the Complainant from Mr. Mitchell, the Senior Assistant Superintendent, Services. That document (filed as Exhibit 37) recounts a meeting between them at which the Complainant had raised (*inter alia*) the following concerns of which Mr. Mitchell said he had apprised Mr. Cowie, the Deputy Superintendent:

Concern # 2 (a): That unit manager, G. Ellis, was blaming, "Michael McKinnon", rather than accepting staffs displeasure for controversial decisions made by Mr. Ellis, and that Mr. Ellis keep out of your business.

Concern # 2 (b): That unit manager, B. Melville, also keep out of your business and stop making innuendos to staff regarding "Michael McKinnon".

In respect of the first concern, the Complainant testified that Mr. Ellis had been blaming him for the strict enforcement of rules and regulations in the facility, saying to his co-workers such things as "we have to do it by the book because Mr. McKinnon is on." There was, however, no evidence that such disparaging conduct was directed at the Complainant by Mr. Ellis because of his native heritage, or that it was for that reason inadequately addressed by management. The second

concern had to do with Mr. Melville's having allegedly told people in the workplace that the Complainant had persuaded a female colleague to accuse that manager of sexual harassment (a matter to which I will return.) This testimony went uncontradicted, and the contention that management did virtually nothing to redress these concerns was not met with any evidence that it had. In the submission of counsel for the Complainant:

What this demonstrates is that members of management were contributing to the poisoned environment that Mr. McKinnon had to work in. He was faced with an undermining by management of his position with his co-workers, and blaming Mr. McKinnon when people have to do their jobs contributed to a stressful and harassing environment for Mr. McKinnon.

Counsel for the Complainant then placed in the context of the workplace environment the 1992 complaint of Vince Daley that was considered earlier in these reasons in relation to the alleged use of racist language by the Complainant. Mr. Daley's accusation was that, by inciting a charge of sexual harassment against him, the Complainant, who was also alleged to have uttered racist comments some years previously, was guilty of racial discrimination and harassment. Although these accusations were found to have been totally unfounded and the Complainant was unqualifiedly absolved by the Independent Investigations Unit, this matter continued to affect the environment of the workplace until its report was issued in May of 1995.

The next matter had to do with the Complainant's having brought to management's attention in October of 1992 a "cartoon" that he discovered in the workplace crudely crafted from the picture of a woman on the cover of a TV Guide by disfiguring it in various ways and festooning it with swastikas and a head-piercing arrow. (Exhibit 40.) Other than to demand an occurrence report from the Complainant (Exhibit 41), there was no evidence that management made any effort to get to the bottom of this matter, or cautioned staff that such conduct would not be tolerated. Although he forwarded two memoranda seeking information as to what if anything was being done about it (Exhibits 42 and 43), no response was received.

There was also evidence of graffiti in the form of a cartoon, or picture, of a rat found in a patrol hut in February of 1994 by Mr. Gallina, entered as Exhibit 44. This was supplemented by testimony to the effect that the term "rat" is regarded in the Centre as highly insulting. The drawing of the rat shows an "M" printed on one ear and the lettering "Mc" on the other, with "O.P.S.E.U." across its front. Unlike the "cartoon" found in Exhibit 40, this picture is clearly meant to depict the Complainant. Counsel for the Complainant submitted that this:

... shows again the poisoned environment in which Mr. McKinnon was working. And the response which was pretty generalized -- Mr. Cowie -- well eventually the building got painted over. Nothing done quickly to remove the graffiti. Again no message sent to other staff about the inappropriateness of this kind of conduct.

However, while this insult was motivated by a vindictiveness that might be symptomatic of an unhappy workplace, it is not racist on its face and it may well have been aimed at the Complainant as a union official, rather than as an aboriginal officer, and I do not find in it evidence of the kind of poisoned atmosphere with which we are herein concerned.

Counsel for the Complainant then returned to the matter of Mr. Melville's rumour-mongering. Mr. Bunting, a former officer at the Centre, testified that he had been told by Mr. Picard, his supervisor at the Pembroke Gaol, that when attending a managers' training session Mr. Melville had indicated that all the problems at the Centre were caused by the Complainant. Mr. Bunting informed the Complainant of this branding of the Complainant as a troublemaker at a time when Mr. Melville was engaged in spreading even worse rumours implicating the Complainant and Ms Smith, a co-worker, in a sexual relationship alleged to have occurred during a hockey tournament in Ottawa. This led to grievances by both Ms Smith, whose health was impaired as a result, and the Complainant, whose anguish was heightened by the fact that his wife was away from their common workplace recovering from a near-fatal miscarriage. In the course of its lengthy decision in this matter, and after establishing the facts of the case, the Grievance Settlement Board (the GSB) pointed out (at page 111) that Ms Smith (one of the grievors):

... is subject to the Collective Agreement between Management Board of Cabinet and the Ontario Public Service Employees Union, and as such, she has a right to freedom from harassment in the workplace because of sex by ... her Employer or agent of [her] employer or by another employee.

That is, she has a right to be free from a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

It is the overall responsibility of the Employer, that is, management and supervisory staff, as well as the individual duty of each person in the workplace, to ensure that the workplace is free of harassment. The directive from the Management Board of Cabinet dated March 1992, sets out a number of principles. One of these is that:

A work environment that is free from harassment, as defined in this directive does not tolerate an abusive atmosphere where an employee is subjected to offensive remarks, behaviour or surroundings that create intimidating, hostile or humiliating working conditions.

That text was repeated verbatim by the GSB when setting out separately its decision regarding the Complainant's grievance. However, before turning to its specific decisions in the two grievances, the GSB made the general observation (at page 111) that:

The evidence demonstrates clearly that the contact between Mr. McKinnon and Ms Smith during the Ottawa tournament was no more than as associates acknowledging each other. There was no evidence of intimate contact of any kind; indeed there was not even the slightest suggestion.

A number of other findings of the three-member GSB relating to matters that were before me are rather cogent and indicate both the inappropriateness of the conduct and the Superintendent's inadequate attention to it. Although it was found that Mr. Cowie's overall response was "professional, prompt, balanced and reasonable", it was "the opinion of the Board [the GSB] that had Mr. Cowie and/or Ms Doherty issued a directive it would have provided a clear statement of Management's unwillingness to tolerate the spreading of the rumour within the workplace." (See at page 128.) The following passages are found in that part of their decision dealing specifically with the Complainant's grievance (beginning at page 132):

... The evidence demonstrates that Mr. Melville has, in the past, said things in the workplace about Mr. McKinnon which were inappropriate and which Mr. Cowie determined were at the time worthy of correction, but not of discipline. There was no evidence of this conduct after April 3, 1993.

The Board found most disturbing the evidence given by Mr. Melville and Ms Doherty, that he, Mr. Melville, had taken it upon himself, during a conversation with Ms Doherty to inform her that Mr. McKinnon was a "womanizer". He told her of an incident which he had heard about, referring to Mr. McKinnon's alleged attendance

and conduct at a social affair outside his workplace attended by a number of staff from Metro East. The information he was passing on was guaranteed to put Mr. McKinnon in a bad light. Mr. Melville does not seem to appreciate that there was a risk that the information was not true, indeed Mr. McKinnon vehemently denied it ... For the Board, one of the most disturbing aspects of this scenario, was that there was no evidence that Ms Doherty said anything to point out to Mr. Melville, that information based on rumour was usually unreliable, or that there was a mechanism for complaints that was well-publicized which anyone who was offended could use. By failing to counter Mr. Melville's passing on of the rumour, she became a participant and receiver of rumours. One of the most effective ways to stop rumours is for the receiver to inform the deliverer that he or she does not want to hear that gossip. Further, there was no evidence that Ms Doherty gave Mr. McKinnon an opportunity to respond to the accusation which had been unofficially made against him, and she therefore, allowed herself to retain and accept this rumour of Mr. McKinnon's alleged questionable conduct. It cannot help but affect her impression of him, and that may have been the reason Mr. Melville drew it to her attention.

The GSB went on (at page 134) to find that "the presence of this rumour in the workplace created a poisoned work environment for the Complainant and that it constituted a course of vexatious comment ... that is known or ought reasonably to be known to be unwelcome." And it concluded its findings prior to dealing with the matter of remedy as follows (at page 137):

It is the finding of the Board that Ms Doherty failed to deal directly with Mr. McKinnon's complaint, and further, there was no evidence that she instructed other members of Management to respond to it in order to effect a resolution of the matter and to attempt to provide a workplace free of vexatious comment for Mr. McKinnon.

A minor incident that occurred after Mr. DeGrandis became Superintendent in 1994 concerned a weekend's delay in circulating in the Centre a particular issue of a black community newspaper, or magazine, called "SHARE" which contained the report of an interview of the Complainant and Mr. Mark Daley that raised accusations of racial and sexual harassment in the Centre. The article (Exhibit 45) was most unflattering to the institution, and it was suggested that there was something untoward in Mr. DeGrandis having held back its distribution "because he thought there was a potential health and safety issue [whereas] if you look at it there is no such problem with it." On the other hand, Mr. DeGrandis testified that some correctional officers had advised him that the item contained material "troublesome to safety" in the sense, I took it, that it might be inflammatory. He removed the paper on a Friday, used the weekend to read it over and, finding

no reason to keep it out of the institution, approved its distribution the following Monday. It would seem to me to have been prudent of him to have checked out the concerns brought to his attention by members of his staff and, while it would not take a weekend to read the article in order to conclude that it presented no problem, there was no evidence of undue delay, let alone of a racially motivated delay. In my opinion, this incident cannot reasonably be seen to have contributed to the poisoned workplace environment of which the Complainant complains.

In January of 1995 the Complainant was appointed an acting OM16, or lieutenant, in which capacity Mr. DeFranco indicated he had performed extremely well. That appointment overlapped the grievance arbitration involving himself, Mr. Melville and Ms Smith, to which reference has been made. The Complainant testified that when he spoke to Mr. DeGrandis of his concerns about working with Mr. Melville he was offered a transfer to Whitby and that not long afterwards his acting assignment was terminated. Mr. DeGrandis said that the Complainant's expression of concern had nothing to do with the conclusion of his posting, but rather that he had decided that such assignments should be for six months and the Complainant's time was up. It was pointed out on behalf of the Complainant that it was only after he was removed that a memorandum was circulated indicating that, in order to broaden access to them, such assignments would be limited to a term of six months. Moreover, inconsistent with that stated policy were the facts (stipulated to by the Respondents just prior to argument) that three other individuals on similar acting assignments at the time continued somewhat beyond the six months, and that two of them had further assignments as operational managers after the summer of 1995, such additional assignments again being slightly in excess of six months and, from time to time each of them had "relief" assignments as operational managers for periods of several days.

It was submitted that Mr. DeGrandis's explanation was not credible, and that the reason for the Complainant's removal from his acting assignment was that he had "come forward with concerns, and it shows again the mind-set, that the poisoned environment at the Metro East Detention Centre was continuing to that point in time, seven years after the first complaints were raised." In my opinion, however, the facts that some appointments went slightly beyond the allotted time and that some persons got additional appointments later do not constitute evidence of a workplace

environment that has been poisoned from a human rights perspective. It is difficult to reconcile an intention on Mr. DeGrandis's part to contribute to such an atmosphere by the untimely removal of the Complainant with his having approved of that appointment in the first place. While there is other evidence indicative of such an environment, there is nothing before me to suggest that Mr. DeGrandis was improperly motivated and I am not prepared to find in this particular incident anything smacking of racism.

Concern was also raised over the fact that upon his return from a prolonged absence from the workplace, Mr. Geswaldo was placed in a position of supervision over the Complainant. The Complainant sent an occurrence report to Mr. DeGrandis (Exhibit 192) complaining of having been contacted by Mr. Geswaldo who had entered the control room to get the Complainant to sign a document of some kind related to their work. Mr. DeGrandis, who testified that he did not know of Ms Doherty's previous instruction in that regard (Exhibit 115), indicated in the margin of that occurrence report his opinion that "no such arrangement should ever be entered however if such had been agreed to in writing by my predecessor I would honour it" (*sic*). In his view, such an arrangement is impractical since all staff must work together in emergencies. He said that he discussed the matter with Ms Buhagiar, who was then the Acting Deputy, and she in turn wrote a memorandum to the Complainant stating in part:

In response to your concern, I have met with Mr. Geswaldo and apprised him of same. He has indicated to me that he will maintain a professional relationship with you should that [*i.e.*, contact for the purpose of supervision] become necessary.

I am confident that the issues which give rise to the Board of Inquiry under the Ontario *Human Rights Code* will not be the subject of any unreasonable conduct on the part of Mr. Geswaldo. Accordingly, I see no reason to re-assign Mr. Geswaldo or yourself at this time. If something further should arise then the matter can be re-visited at that time.

Although there is no allegation of misconduct by Mr. Geswaldo towards him as a result of this situation, counsel for the Complainant submits that Ms Doherty's commitment has not been honoured, the suggestion apparently being that this somehow taints the workplace environment in a manner prohibited by the *Code*. However, it seems to me that Mr. DeGrandis, who is

opposed to such arrangements in principle, made a reasonable attempt to abide by the spirit of his predecessor's commitment, a failure to adhere to which would not in my opinion be *ipso facto* racist in any event. While the arrangement outlined by Ms Buhagiar was unwelcome to the Complainant, I have no doubt that it was equally uncomfortable for Mr. Geswaldo who seems to have taken care to avoid giving the Complainant anything further to complain about. In any event, I find nothing in that arrangement to suggest that management thereby caused or contributed to a racist atmosphere in the Centre.

A minor matter of some cumulative weight referred to by Counsel for the Complainant was the improper reference to an "aboriginal inmate" that was entered in the log book in the admitting and discharge area. (Exhibit 197.) When this was drawn to his attention by the Complainant, Mr. DeGrandis acknowledged that it ought not to have happened. What this shows is the persistence of an atmosphere in which this kind of thing continues to happen. Moreover, there was no evidence that anything was done about it.

Amongst the most cogent evidence regarding the workplace environment at the Centre was that of Mr. Mondesir, a black officer who had been working there since January of 1991 as a CO1, or "casual", the most salient excerpts of whose testimony follow (beginning at number 176 of Side A of Tape 3 for July 17, 1996):

Q. [By counsel for the Commission] During the period you worked there, have you observed, yourself, any incidents of racism with regards to Michael McKinnon.

A. Yes, sir.

Q. Could you, perhaps, relate those to the Board at this time?

A. I overheard a conversation between two guards who were discussing Mike and they referred to a headdress and Mike being the "Chief". I also heard that when Mr. McKinnon was becoming an acting supervisor [*i.e.*, in January of 1995] that we were to beware because he would be out to "scalp" us. ...

Q. Have you personally witnessed any incidents of racism directed towards inmates?

- A. Yes, I have. ... Some of the professionals that I work with, they will call an inmate a "scrout", or they call him a "nigger", or whatever it takes to get the inmate upset, or to get a rise out of the inmate. ...
- Q. And is that an isolated incident, or is that something that occurs on a regular basis?
- A. It occurs on a regular basis. ...
- Q. Have you personally been the subject of any racial comments?
- A. Yes, I have.
- Q. And by whom?
- A. Inmates. In a few instances I have been called "nigger" to my face by inmates. My partner has used the word "nigger" in front of me and then later apologized, stating that I am not like the rest of them. ...
- Q. [By counsel for the Complainant] Do you know of any occasions where managers have witnessed that kind of conduct? Have you seen managers witness that kind of conduct?
- A. Yes.
- Q. And did the managers respond in any way?
- A. No. ...
- Q. Now, with respect to incidents where inmates have referred to you as "nigger", have you ever made any complaints to management about that, any instance where you made a complaint to management?
- A. Yes.
- Q. Can you describe that for us?
- A. I would've called my floor supervisor and explained the situation, and also the time the inmate would go downstairs, he'd be charged with misconduct. He'd be sent downstairs, adjudicated, and serve time if found guilty of misconduct.
- Q. Have you ever had any occasion where you have attempted to have that done and it's been rejected?
- A. Yes. The inmate has gone downstairs ... and he was just let off with a warning. ...
- Q. Now, you said that you wanted the unit locked up, that the inmates shouldn't get their privileges, that they became abusive to you. Explain what you mean by "abusive", how were they abusive?
- A. They would not comply with any of my orders. They were swearing at us. They were calling us "nigger" -- I was working with an Indian gentleman, they kept on referring to him as "Paki", things like that.

Q. And did you bring those comments to your supervisor's attention?

A. Yes.

Q. Who was your supervisor?

A. My supervisor was Bob Stewart.

Q. And how did Mr. Stewart respond?

A. I think Mr. Stewart spoke to Ms Buhagiar and there was no response.

Q. Did you request that the abusive inmates be removed from the unit?

A. Yes, I did.

Q. And what was their response?

A. There was no response.

Mr. Mondesir was a credible and sincere witness whose evidence shows that racial name-calling still "occurs on a regular basis" in the Centre and that, although by then no longer done in his presence, the Complainant was the butt of racist commentary in the workplace at least as recently as January of 1995 when Mr. Mondesir overheard others saying that as an acting operational manager the Complainant would be out "to scalp" people. He testified as well that managers at times witnessed racist conduct, and at other times had it drawn to their attention, but did nothing about it.

Mr. Cowie's evidence as to the way in which the issue of racial harassment was dealt with under Ms Doherty when he was Deputy Superintendent touched upon a complaint by Mr. Mondesir about inmates making racist comments. He testified about gathering reports at Ms Doherty's request from correctional officers working in the admitting and discharge area in October of 1991 regarding their knowledge, if any, of racial harassment occurring there. Those reports, which were entered together as Exhibit 154, reveal that racist commentary was commonplace, but regarded as acceptable if meant to be humorous. In any case, there is no indication that these reports led to any action.

Mr. Cowie was then questioned about a complaint he received from the Complainant as Vice-President of the local concerning "the inordinate delay and the lack of response on the part of senior management" regarding allegations of racism brought to the attention of Mr. Groulx, a

copy of which complaint he forwarded to Ms Doherty in June of 1992. (Exhibit 156.) He said that he instructed Mr. Small, the Assistant Deputy Superintendent, Corrections, to find out from Mr. Groulx what the matter concerned. As a result of what Mr. Small told him, Mr. Cowie concluded that Mr. Groulx (who obviously had failed to inform more senior management about the matter) had not undertaken any form of investigation into the complaint in question, which complaint, it turns out, had been made by Mr. Mondesir.

In August of 1992, Mr. Cowie and Ms Doherty met with Messrs Miller and McKinnon as officers of the union to discuss these concerns. Although his notes of this meeting (Exhibit 157) do not record an agreement or consensus of any kind, to the best of Mr. Cowie's recollection management's apparently unilateral response to the situation was to put on a one-day race relations training session for managers which it scheduled for September 9, 1992. (Exhibit 151.) Apparently, nothing was reported to Mr. Mondesir regarding his specific complaint which, in fact, does not seem to have been dealt with; nor is there any suggestion that anything was done regarding Mr. Groulx's failure to conduct an investigation as, presumably, he was supposed to have done. It is to be noted as well that Mr. Cowie's evidence did not deal with the more recent circumstances alluded to by Mr. Mondesir, and although they were specifically referred to in his testimony, neither Mr. Stewart, his supervisor, nor Ms Buhagiar, a senior manager at the time, was called as a witness.

At one point in his submissions, after referring to Mr. Cowie's evidence regarding Mr. Mondesir's complaint, counsel for the Respondents said that:

... the issue was dealt with, if not as Mr. Mondesir would have liked it dealt with, the matter was dealt with; and if we get into that, then it seems to me that, as to the judgments of management, then you are clearly into a labour relations issue, and it still is management's right to manage.

While management undoubtedly has a right to manage, it has concomitant duties, one of which is to respond appropriately to complaints of racial and sexual harassment in the workplace; and, in the context of a hearing under the *Code*, whether its response to such complaints was

appropriate is not for management to decide. In fact, the management of the Centre did not deal with Mr. Mondesir's complaint at all, and its response to the general problem of racial and sexual harassment in the workplace has been inadequate and ineffective, as is evidenced by the cumulative weight of the many incidents just reviewed. Mr. Mondesir's testimony indicates that conditions have not improved since the GSB in the Melville-Smith-McKinnon grievance concluded that "there was a poisoned work environment for the Complainant", and there was nothing in the evidence as a whole to suggest that it had.

I come now to matters of similar fact evidence, the first of which concerns Mr. Mark Daley, another black officer who, like Mr. Mondesir, was a CO1, or "casual" employee at the Centre. Mr. Daley testified about a number of instances of racial comment and harassment to which he was subjected while working at the Centre from May of 1990 to the end of 1993. Upon arriving for work on August 23, 1990, Mr. Daley went to the locker room where he found the words "nigger", "goof" and "rat" written on his locker, which was also covered with toothpaste. In contemporaneous notes kept by him Mr. Daley made the following observations that same day (Exhibit 88), which were confirmed and enlarged upon by him during the course of his testimony:

Locker covered in toothpaste. "Nigger" "Goof" & "Rat" scribbled on front of locker. Reported this to Assistant Superintendent (Mr. P. Mulhern) (Same day). And after a brief discussion I was told that "it is part of the process" "It is part of becoming adjusted" & that "However I've never seen it go this far. But one has to be able to handle these things" - Also - "These people may be doing this because you are coming across as thinking you are better than them because you have an education." Also I should try "socializing" & "hanging out" with these people.

Mr. Weekes, who was another black correctional officer working in the Centre at the time, testified that when Mr. Daley approached him as his union representative he was terribly distraught over the incident. In that capacity, Mr. Weekes forwarded a memorandum to Ms Doherty appealing to her to launch an investigation into the matter. (Exhibit 96.) Then, in indignation and frustration, Mr. Weekes expressed his disgust and condemnation of the occurrence at "parade", for which he in turn was reprimanded. (Exhibit 97.) While Mr. Weekes acknowledged that it was not his place to have done so, his explanation for his conduct reveals

the racist way in which he was treated in the institution from the moment of his arrival when he was greeted with the observation: "You mean another fuckin' nigger?" (Exhibit 98.)

Mr. Daley testified that when he finally met with Ms Doherty two weeks after the event the words were still on his locker where they remained for several more days until after further requests a maintenance worker scrubbed them off with ajax. In his opinion, no real investigation of the matter was undertaken and, judging from his contemporaneous note of that meeting, he had had no real expectation that anything constructive would be done. That note (Exhibit 89), written September 6, 1990, reads as follows:

- Met with Super & Deputy Assis. They too blamed it on me getting "adjusted" (I might add that at this point no attempts have been made to find out anything concrete about the incident.)
- Anyway from the way this meeting went it looks like everything will be "swept under the rug"
- I mentioned to both parties that if they wanted to conduct an investigation there are fingerprints in ink still on the locker & the writing itself is very pronounced & could be easily tracked - Once again I was shut down. As a matter of fact the Superintendent's exact words were "I'm not going to conduct an investigation without more concrete facts" ... And I ask myself what more concrete facts do we need?

Ms Doherty's evidence regarding Mr. Daley began with the comment that he appeared to have had difficulties in his inter-personal relationships with his colleagues. Although the relevance of that unsubstantiated observation escapes me, it does seem to suggest that she shares the victim-is-more-or-less-to-blame view ascribed to Mr. Mulhern by Mr. Daley. In any event, she went on to say that Mr. Daley seemed to know who had vandalized his locker and racially harassed him but refused to tell her. She offered no basis for so surmising, and what she thought he "seemed" to know is contradicted by Mr. Daley's testimony and is inconsistent with all the circumstances. It is simply unbelievable that he would report the incident, request a meeting with her, actively seek to have the matter investigated, and then through silence protect those whom (*ex hypothesi*) he knew to be likely culprits. As it happens, in the reports submitted by both Mr. Daley and Mr. Weekes there were individuals who were identified as having been on the scene, but no attempt was made by management to obtain reports from them.

Ms Doherty went on to testify about the Complainant's role in this particular episode, he having been the Vice-President of the local at the time. She said that he had suggested having both the locker and all of the staff fingerprinted, but that she did not do so for a number of reasons: lack of resources; absence of a specific suspect; police advice of its inadvisability; an overabundance of "innocent" prints because of the general access to the area. She thought that the Complainant might also have suggested a couple of names, but could not really recall. Nor could she recall whether he had said that the union itself would interview the staff. In fact, however, it was Mr. Weekes's evidence that he had acted as Mr. Daley's union representative and the Complainant, whose only testimony regarding the incident was given in reply, confirmed that he had not acted as a representative of Mr. Daley in this matter, and he said that he had had no meetings whatsoever with Ms Doherty about it, nor had he had any information as to who the culprit or culprits might have been.

Although Ms Doherty, whose recollection of these events is obviously flawed, thought that she had issued a memorandum to staff shortly thereafter to the effect that racial discrimination and harassment will not be tolerated, no such document was placed in evidence. However, it must be pointed out that, when asked whether there was ever any general communication issued to the staff of the institution regarding the incident, Mr. Daley appeared to confirm her recollection. His response to that question together with counsel's follow-up questions were as follows (at number 556 of Side B of Tape 2 for July 4 of 1996):

- A. I would say a few days later, at best, a document was read on parade. Something to the effect of discrimination and harassment, or writing on lockers would not be tolerated. That sort of thing. But not -- there was never anything really substantial. And that was only made -- it lasted five days or a week, and after that it was tossed aside, or put aside.
- Q. Are you aware, talking about it, that that was read on parade?
- A. I don't understand what you're asking.
- Q. Do you know whether Mr. Weekes had any involvement in that statement being read on parade?
- A. I'm not aware that he did or didn't. I -- I -- I was just under the assumption that that was on the behalf of management. I'm -- I'm not certain.

It is evident that Mr. Daley's response took counsel for the Complainant by surprise, and his reference to Mr. Weekes was meant to jog that witness's memory which, in light of what subsequently transpired, I am satisfied was faulty in that regard, as was that of Ms Doherty. The fact of the matter is that, as a result of the terms of settlement of a grievance brought by Mr. Weekes regarding his treatment for having spoken up at parade, the text of such a document was approved by order of the Grievance Settlement Board on March 21, 1991, some *seven* months after the event, and was required to be read at parade for five consecutive days. (Exhibit 99.) If this had in substance already been done soon after the event, surely the preparation and public reading of such a memorandum, addressed to all staff and referring specifically to the locker incident, would not have been required as one of the terms of settlement of a grievance arising out of that very incident. Obviously, Mr. Daley and Ms Doherty got the timing wrong.

Thus, quite apart from any question as to whether this incident ought to have been investigated in a more timely and efficient manner, clearly management was remiss in its failure to react vigorously and promptly to condemn it. In my opinion, that such a reaction, grudgingly given, had to await the outcome of a grievance precipitated by the disciplining of yet another black officer for the spontaneous expression at a technically improper time and place of his well-founded outrage over that incident is nothing short of lamentable.

Mr. Daley testified that he continued to experience problems with racism throughout the time he worked at the institution until he left in the Fall of 1993, and another specific incident that he related occurred in June of 1992. He said that when working on the 2B unit he overheard a statement made by CO2 Ted Barclay while watching a television report relating to the Yonge Street (Toronto) and Los Angeles riots, and dealing with statistics regarding the number of blacks who had been shot by police. Mr. Daley testified that when another officer joined him in front of the television set Mr. Barclay, who was apparently unaware that Mr. Daley was in the vicinity, commented that: "They should shoot more niggers, maybe they'll learn". While the statement attributed to Mr. Barclay in Mr. Daley's log entry made at the time (Exhibit 90) is simply that: "they should shoot more maybe they'll learn", its preamble refers to the shooting of Blacks and

Mr. Daley said that he distinctly remembered that word being used. Obviously, whether one uses the word "nigger" or not, to recommend the killing of more Blacks as an object lesson to others of their race is blatantly racist.

Mr. Daley went on to testify that he took Mr. Barclay aside and warned him that he would report such conduct in the future, but that, although he did not report the incident, somehow management learned of it and there were rumours that he got Mr. Barclay into trouble. Mr. Cowie wrote a memorandum to file in August of 1992 regarding his meeting with Mr. Barclay concerning this matter (Exhibit 153). According to that memorandum, Mr. Barclay claimed that what he had said was: "They are lucky more people didn't get shot." Mr. Barclay was not called to testify, and the memorandum was not offered as proof of anything other than that Mr. Cowie had in some way addressed the matter. However, Mr. Daley was not interviewed by Mr. Cowie regarding the incident, nor was he ever informed that Mr. Barclay had been spoken to.

Another incident Mr. Daley related occurred in May of 1993 when, after being asked to come to work early because of staff problems, he arrived somewhat later than expected because he had to make child-care arrangements. He indicated that CO2 Anne Thompson remonstrated with him and ended by saying that "it's no wonder somebody wrote 'nigger' on my locker". In the occurrence report he filed regarding this matter (Exhibit 91) Mr. Daley noted that: "This is not the first time Officer Thompson has passed a comment like this in my direction".

The filing of this report led to Mr. Sellick's intervention, threatening this "casual" employee over the telephone with the loss of his employment unless he withdrew his complaint regarding Ms Thompson. This resulted in the filing that same day of another occurrence report by Mr. Daley (Exhibit 92) at the end of which he states:

When I instructed Officer Sellick that I would not be "withdrawing" he shouted several profanities into the telephone before literally throwing the telephone receiver (*sic*) in what was obviously a fit of rage. At that point I hung up the telephone. I see this assault as blatant evidence of the ongoing organized bullying and swarming of targeted officers. This is a problem of severe consequence as it is very clear that we are forced to work in what is a corrupt and poisoned environment. My biggest concern at this point is how are we to function as correctional officers in a "security" minded environment with these types of individuals as our back-up and "brothers"?

In the course of his evidence in these proceedings Mr. Sellick denied having made such threats. I do not believe him, and I accept the evidence of Mr. Daley in this regard. At one point Mr. Sellick, who had a liking for Nazi memorabilia that got him into trouble with Mr. DeGrandis, was asked about an incident concerning Mr. Doug Pickett who has a form of cerebral palsy and walks with a pronounced limp. Mr. Sellick was asked whether he had told Mr. Pickett that he could "still get you into the 'Aryan Brotherhood' despite your obvious flaw". Not surprisingly, he denied having said such a thing. However, Mr. Pickett, whose evidence in reply I accept without hesitation, testified that Mr. Sellick, whom he had already heard talking about Nazis, said to him as they were leaving the building one day: "We may invite you to join the Aryan Brotherhood despite your obvious disability".

Mr. Daley has never received any response from management in respect of these occurrence reports, nor any indication that they were ever investigated. He testified that over a month later these matters came up in conversation with the Complainant who, as union representative, went with him to see Mr. Mikel about it. He said that it was plain at that meeting that nothing had been done, a fact that Mr. Mikel ascribed to difficulties in getting in touch with Mr. Sellick. Finally, Mr. Daley set these incidents out in the form of a complaint filed June 4, 1993, under the Workplace Discrimination and Harassment programme (Exhibit 93), but nothing had come of that initiative at the time of his testimony. Mr. Daley ultimately filed a grievance about the locker incident which was settled on February 13, 1996 (Exhibit 94). In the minutes of settlement the Ministry, which agreed to a monetary payment, stated that it "regrets that complaints about the locker incident on August 23, 1990 were not handled with greater sensitivity and more expeditiously".

Towards the end of his review of the facts in this case, counsel for the Complainant had occasion to refer to an incident in 1990 in which, as part of a mandatory training session, Ms Collins, the head nurse, presented an "information session" about AIDS in the course of which she stated that this virus entered the human population as the result of Africans having sex with monkeys.

Following Mr. Insanally's protest (Exhibit 108) the matter was dealt with expeditiously and resulted in a written apology (Exhibits 109 to 111). The incident was referred to for the purpose of drawing a contrast: "One wonders", said counsel, "why such a response wasn't taken in other circumstances: for instance, when Mr. McKinnon made complaints. Again it also shows the environment that exists at the Centre." Frankly, it seems to me that this incident in no way advances such a view. Clearly, the statement was insensitive, but management's reaction to it was swift.

There was an inordinate amount of evidence adduced about Mr. Weekes who was involved in numerous grievances and human rights complaints against the Ministry while he worked at the Centre and who said that he encountered racial harassment and prejudice from the moment he started and was greeted with the comment: "You mean another fuckin' nigger?" His evidence regarding cartoons that were posted and not removed has been reviewed in another connection. According to Mr. Weekes, he was the target of reprisals because of some of his complaints, and in that regard he accused management of threatening to terminate tuition-fee assistance of which he was in receipt. Although it was management's contention that this was simply a budgetary matter, because of his persistent objections the money was ultimately found within the Centre's budget and allotted to him as it would seem management had the authority to do all along.

The final incident dealt with by counsel for the Complainant under the rubric of "similar fact evidence" concerned Lieutenant Linda Ashley who, when working with the Complainant in June of 1994, had occasion to issue a misconduct to an inmate who then accused her of doing so because he was black. Apparently the confrontation was heated and she replied in anger, "Yes, because you're black." The Complainant was of the view that this was not only improper, but a dangerous provocation in the circumstances. His grievance of this latter aspect of the matter failed. However, it was counsel's contention that management's excusing the comment as simply sarcasm reveals the lack of sensitivity as to how such comments might be perceived by black inmates. Counsel said: "Again it shows the environment that continues to exist" at the Centre.

The testimony of Mr. Weekes concerned other matters besides those already dealt with, and there was evidence of other incidents and episodes involving a number of others (such as Mr. Welch,

Mr. Lumley, Mr. Insanally, to name but three). However, these were not touched upon in argument by counsel for the Commission or the Complainant and, in light of my findings regarding the allegations made in the two complaints with which I am seized, and having regard to the purpose of "similar fact evidence", I find it unnecessary to add to this already extremely long decision by dealing with them in these reasons. Counsel for the Complainant who by agreement with counsel for the Commission reviewed the evidence regarding this aspect of the argument concluded his remarks concerning the poisoned workplace environment with the observation that management does not have a concrete, comprehensive and consistent plan of action for addressing problems of discrimination and harassment as they arise. I agree with that submission, and with his suggestion that management's want of seriousness in the view it took of such complaints is further demonstrated by the fact that, although the Complainant's first complaint was filed in 1988 and has been a source of serious difficulty for each successive set of senior managers, none of them was made aware of the complaints and of the attendant problems when transferred or brought into the institution. As he said:

There was no briefing for these people. They're left to find out themselves. If there was a coherent and comprehensive attempt by management to deal with this they would have assured their senior managers knew the background. If there was a real concern on the part of the Ministry about racism in the East they would have assured that briefings had occurred.

PART III - LIABILITIES

1. Liability for poisonous atmosphere

In my opinion, the facts as I have found them, together with the inferences I have drawn, clearly establish that the Complainant suffered harassment, reprisals and discrimination at the hands of the Respondents contrary to the provisions of the *Code*.

The conduct of which the Complainant complains initially took the form of racist name-calling that persisted in a climate that was redolent with racist behaviour, particularly towards black employees and inmates – which was a matter of considerable concern to the Complainant as well, as is made plain by his many documented efforts to have such conduct redressed both internally and through the intervention of outside agencies ranging all the way to the offices of the Premier

of Ontario and the Prime Minister of Canada. (Exhibits 45, 49 to 52, 54 to 56 and 59 to 64.) Such name-calling was followed by acts of direct and indirect reprisal against him for having complained about it. And, of course, the failure of its managers to take appropriate and timely measures to deal with the conduct complained of constituted an infringement by the Ministry of the Complainant's right to equal treatment without discrimination because of race, ancestry or ethnic origin in that the employer permitted a "poisoned work place environment" to exist as a condition of employment affecting the Complainant differently from others.

The following observations regarding the poisoned workplace environment that I made in *Ghosh v. Domglas Inc. et al.* (1992), 17 C.H.R.R. D/216 (at D/227, paras. 76 and 77) are of particular relevance to the matters before me now because there may be instances of harassment in the present case that might not be found to involve a "course of conduct" but for which, in the circumstances, the Ministry ought in my view to be held responsible:

It is now beyond question that the atmosphere in which an employee must work is a condition of his or her employment, and should that atmosphere be oppressive or "poisoned" for a minority group, that circumstance might amount to discrimination on a prohibited basis. Management personnel who know, or ought to know, of that condition but permit it to continue thereby discriminate against the affected employees even if they are not themselves actively engaged in the production of that atmosphere. Where such discrimination is based upon a prohibited ground it is caught by the Code. There is a long line of cases to that effect decided under the previous Ontario *Code* and this same reasoning has been found applicable in respect of the present Ontario legislation; see: [cases omitted].

The importance of the "poisoned atmosphere" or "poisoned work environment" principle under the present *Code* is that there may be known instances of harassment by anonymous employees, or of known harassing conduct not caught by s.4(2) [now s.5(2)] because no one perpetrator indulged in a "course" of such conduct, or the member of the minority group discriminated against by having to work in that poisoned environment may not have been the person harassed. ...

While the ministry alone is liable for the "poisoned atmosphere" that has clearly persisted throughout the period under review, in my opinion it must also share liability with the other Respondents for their specific infringements of the Complainant's rights under the *Code*. Thus,

before considering separately the liability of each of the individual Respondents with whom the corporate Respondent is jointly and severally liable, it is useful to explain the basis of the Ministry's overriding liability. The matter of liability for the tainted competition in respect of the OM14 positions is addressed separately at the end of this section because, as will become apparent, it cannot readily be dealt with elsewhere.

2. Liability of the Ministry of Correctional Services

Although vicariously liable under the *Code* for the discriminatory acts or omissions of any of its employees in the course of such employment, by reason of s.45(1) of the *Code* the Ministry is not vicariously liable for acts of harassment or reprisal engaged in by its employees. However, it is nonetheless answerable under the so-called "organic theory of corporate liability" for the wrongful conduct of its employees engaged in while acting in their capacity as part of the "directing mind" of the Ministry. The classic analysis of that theory is found in the decision of Professor Cumming in *Wei Fu v. Ontario Government Protection Service* (1985), 6 C.H.R.R. D/2797, in which he held that if the offending employee is part of the "directing mind" of the corporation, then the wrongful act is that of the corporate employer as well. He pointed out that that principle applies to both acts and omissions so that, in the present circumstances, the Ministry would be responsible not only for the active breaches of the *Code* by these named individual Respondents, but for their failures, as well as those of other managers, to respond appropriately to the racial problems that have been described, assuming them to have formed part of its directing mind in the circumstances. In reference to an earlier decision that shares many of its features with the instant case, Professor Cumming explained in *Wei Fu* (at D/2801, para. 22922) that:

... The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. ... For example, in another case under the former legislation, *Dhillon v. F.W. Woolworth Co. Ltd.* [*infra*] where the management in a warehouse "knew, or should as reasonable men acting as management have known, that there was regular, and significant verbal racial harassment" and "did not take reasonable steps to put an end, or at least minimize, the racial abuse" the Respondent corporation was held to be in breach of the *Code*.

And he went on to say:

... Generally speaking, whenever an employee provides some function of management, he is then part of the "directing mind". Once an employee is part of the "directing mind", and the contravention of the *Code* comes in his performing his corporate function, the corporation is itself also personally in breach of the *Code*.

In addressing more particularly what it is that might amount to a "corporate function", I expressed the following opinion in *Ghosh (supra)*, at D/224, paras. 54 and 55):

... whether one employee is part of the directing mind of a corporation when dealing with another does not depend solely on their relative ranks within the organization. While the suggestion that, "generally speaking, whenever an employee provides some function of management, he is then part of the directing mind" is sound and helpful, it leaves open the question as to what it is that qualifies as a management function for that purpose. ... Having regard to the nature and purpose of human rights legislation, I should think it sufficient in principle that the harassing employee was in a position to make decisions on behalf of the company seriously affecting the victim.

That this is the appropriate test for determining whether an employee is part of the directing mind of a company seems to me to follow from the reasoning of the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.R.R. D/4326. While that decision does not afford a way around the express exclusion of vicarious liability incongruously set out in s.44(1) [now s.45(1)] of the *Code*, as I had occasion to point out in the *Shaw* case (*supra*, at D/66):

... it stresses the importance of holding the employer liable for infringements of human rights legislation because the purpose of such enactments is to compensate the victim rather than to punish the wrongdoer, and employers are best able to effect the remedial measures called for. It was declared that, since human rights legislation is "concerned with the *effects* of discrimination rather than its *causes* (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy – a healthy work environment.

I fully agree with the submission of the Commission and the Complainant that each of the individual Respondents was part of the "directing mind" of the Ministry's operations at the Centre. It is beyond question that both Mr. Simpson, the Superintendent, and Mr. Hume, the Senior Assistant Superintendent, acted in such a capacity in their dealings with the McKinnons. The circumstances already reviewed at great length show clearly that Mr. Geswaldo was a supervisor with control over some of the work assignments of the Complainant to whom he issued various instructions. In so doing he was effectively making decisions on behalf of the Ministry

that affected the Complainant, and in the course of such activity he committed acts of racial harassment and reprisal (in the form of "targeting") which occurred in the workplace during working hours and were thus within the scope of the corporate function carried out by him. While Mr. James's offensive behaviour did not occur during the course of his supervision of either of the McKinnons, he was acting in a managerial capacity when he proclaimed the need to "clean up the mess" made by the Complainant and when he chose to "rebuke" an inmate by making a remark that was insulting to Ms Shaw-McKinnon. Thus, I am satisfied that the Ministry is jointly and severally liable with the other Respondents for their infringements of the *Code* with which I will deal presently.

Although they are not Respondents, Ms Doherty, Mr. Poynter, Mr. Cowie, Mr. Mikel, and Mr. DeGrandis were also part of the "directing mind" of the Ministry in carrying out their functions on its behalf at the Centre and, to the extent that their acts and/or omissions previously described contributed to the poisoned workplace environment, the Ministry is responsible for that conduct as well. Of course, the Ministry's responsibility for that environment does not depend on the organic theory of corporate liability since conduct causing or failing to abate such a condition can be characterized as discriminatory and, as such, would fall within the employer's range of vicarious liability under s.45(1). In that regard, Professor Cumming's observations in *Dhillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743, (at D/760, para. 6691) are most apposite:

Verbal racial harassment, through name-calling, in itself, is in my view prohibited conduct under the *Code*. The atmosphere of the workplace is a "term or condition of employment" just as much as more visible terms or conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological circumstances in the workplace. There is a duty on an employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the *Code* ...

The nature of the employer's duty when faced with problems of racist behaviour in its workplace and what it ought to do in order to fulfil that duty are considered in a number of cases, including the following that were cited by counsel: *Mohamed v. Mariposa Stores Limited Partnership* (1990), 14 C.H.H.R. D/215, *Commission des droits del la personne du Québec et Katé c. Commission scolaire Deux-Montagnes* (1993), 19 C.H.R.R. D/1, and *Uzoaba and Canadian*

Human Rights Commission v. Correctional Service of Canada (1995), 26 C.H.R.R. D/361. In *Hinds v. Canada* (1988), 24 C.C.E.L. 65, what is involved was explained as follows (at p. 77):

... there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment. [Citations omitted.] To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself. [Citations omitted.] To avoid liability the employer is obliged to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment. A response that is both timely and corrective is called for and its degree must turn upon the circumstances of the harassment in each case.

It is obvious from a review of the evidence that the workplace environment of the Centre was poisoned by racial harassment and discrimination, and that such sporadic efforts as were undertaken to address it were inadequate and often begrudged. The Complainant's requests for action were viewed with suspicion and either ignored, mishandled or met with undue delay, as were the complaints of several others. The "race relations committee" (of which little has been said, as befits the matter) was ineffectual and scorned by its ostensible beneficiaries (as indicated by the evidence of Messrs Miller, Weekes and McKinnon), and nothing was achieved by the commissioning of one Natalie Bronstein to prepare a report reviewing the entire "labour relations situation" at the Centre which had apparently become something of a shambles (and about whose report nothing was needed to have been said; but see Exhibits 58 and 210).

For all the above reasons, it is my view that the Ministry has infringed the Complainant's right to equal treatment without discrimination because of race, ancestry or ethnic origin through permitting a poisoned workplace environment as a condition of his employment, the consequences of which will be seen in the next section dealing with remedies.

3. Liability of Frank Geswaldo

Having regard to the definition of that term in s.10(1) of the *Code*, four conditions are required to be met in order for conduct to amount to harassment under s.5(2): there must have been (a) a course of vexatious behaviour, (b) by an employer, employer's agent, or fellow employee (c) that

was known to the actor (actually or constructively) to be unwelcome, and that was engaged in because of one of the unlawful bases set out in s.5(2); see, *inter alia*: *Boehm v. National System of Baking Ltd.* (1987), 8 C.H.R.R. D/4110; *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972; *Shaw v. Levac Supply Ltd. et al* (1991), 14 C.H.R.R. D/36; *Ghosh (supra)*.

Mr. Geswaldo was amongst those who in the period preceding the events set out in the first complaint called the Complainant by the names "Chief", "Wagon Burner", "McInjun", and "Big Injun" (others using a variety of additional names as well). The "Indian headband" incident in which the Complainant was met with war whoops, dancing and laughter to his evident embarrassment had occurred much earlier. Thus, in my view, Mr. Geswaldo knew of both the Complainant's heritage and his discomfort in being mocked in that regard. On the occasion of the "pow wow" incident, his use of that expression was intended as a racist put-down, as was his rhetorical rebuttal when immediately confronted: "What are you, a 'fuckin Indian'?" The "targeting" incidents that led up to the meeting arranged by Messrs Hill and Meloche were similarly motivated, and the repetition of the 'fuckin Indian' question following that meeting is another incident. There were more "targeting" incidents between the time the Commission's investigator contacted Mr. Geswaldo in June of 1988 and service upon him of the formal complaint – the turning off of computers, last minute changing of assignments, relatively overstrict imposition of rules applied laxly to others, and so on. Similarly motivated were Mr. Geswaldo's public humiliation of the Complainant for committing a common error in the admissions and discharge area, his false assertion of insubordination in connection therewith, and his role in the improper use of these circumstances as an excuse to remove the Complainant from that coveted area. The conduct outlined in paragraph 16 of the second complaint was a matter of retribution and must be seen as racially motivated, as was the conduct involved in the "inmate-overcrowding" and "Nurse Giffen" incidents.

It was observed in *Boehm (supra)*, at p. D/4122) that "the measure of what is 'vexatious' is subjective" and the "proper question is whether the comment or conduct was vexatious to this Complainant" and, as even this brief review of Mr. Geswaldo's behaviour makes clear, his was "a course of vexatious conduct" that was found by the Complainant to be "unwelcome" in the required sense of its being annoying, distressing, troubling or agitating to him. Not only was Mr.

Geswaldo a fellow employee of the Complainant, but in supervising the Complainant he was acting as an agent of their employer. Moreover, from the moment of the "Indian headband" incident that occurred some considerable time before the "pow wow" episode he knew (or ought to have known) of the unwelcome character of that conduct which I find he engaged in because of the Complainant's native Canadian heritage.

Thus, I have no hesitation in finding that Mr. Geswaldo infringed the Complainant's right under s.5(2) of the *Code* to be free from harassment in the workplace by persons such as himself, for which (for reasons already given) he is jointly and severally liable with the Ministry. Since the three incidents of harassment referred to in the second complaint followed upon the heels of the first complaint and were retributive in character they constitute concurrent infringements by Mr. Geswaldo of the Complainant's right under s.8 to claim and enforce his rights under the *Code* without reprisal or threat of reprisal for so doing, and the Ministry is jointly and severally liable for these infringements as well.

4. Liability of Phil James

The facts reveal that Mr. James, as a fellow employee and supervisor, had engaged in a course of conduct towards the Complainant that he knew, or ought to have known, was unwelcome and vexatious because of its racist character. He had called the Complainant by the names "Chief", "McInjun", "Big Injun", "Running Bear", "Canoe" and "Tomahawk". The "drunken Indian inmate" incident was clearly racist, and it was expressly directed at the Complainant and Mr. Flett. While it occurred prior to the signing of the first complaint in which it forms one of the allegations, Mr. James was not named as a Respondent at that time – perhaps because a single incident does not a course of conduct make. However, this was followed by the "having to clean up McKinnon's mess" incident which, along with the "blood cloth" and the "Ms Mattingly" incidents, I found to have been racially motivated episodes of "targeting".

It happens that the two incidents involving Mr. James that are set out in the second complaint are bracketed by two incidents falling on either side of the time frame of that complaint. This raises

questions not addressed by counsel: *How many incidents are required to constitute a "course" of conduct?* and *Can either, or neither, or both of the "bracketing" incidents be taken into account in order to establish that there was a "course" of conduct?*

Since the "Mattingly" incident is post-complaint conduct, evidence of which was admitted because of its "similar fact" character and for the additional purpose of establishing an ongoing poisoned workplace environment requiring certain public interest remedies, in my view it may not be taken into consideration, either directly or indirectly, in relation to the issue of liability to the Complainant. Thus, it is my opinion that this incident cannot be added to the earlier incidents in order to establish a "course" of vexatious conduct that might not otherwise be found and without which there could be no liability for harassment.

Obviously, had there been no second complaint, Mr. James could not be held personally liable for the "Flett" incident described in the first complaint because he would not then have been a Respondent before this Board. However, it is relevant conduct that occurred before the incidents set out in the complaint in which he is a named Respondent and, although he could not be charged with harassment in the earlier complaint because it stood alone at that point of time, it is the first of a series of vexatious acts by him and should be viewed as such. In my judgment, it would be wrong to hold that the intervening complaint against others requires me for the purpose of liability to disassociate that initial and defining reprehensible conduct from what emerged as part of the same hurtful pattern. Indeed, although he argued that none of Mr. James's conduct could be construed as harassing, counsel for the Respondents did not suggest anything to the contrary on this particular point.

Thus, while I have not included the last incident, I have included the first, and because I take the view that these three episodes constitute a "course" of conduct, I conclude that Mr. James thereby infringed the Complainant's right under s.5(2) of the *Code* to be free from harassment in the workplace, for which he is jointly and severally liable with the Ministry. However, while the fact that Mr. James was not a Respondent in the first complaint does not in itself exclude the possibility that his subsequent conduct was meant as a reprisal, except for the "Mattingly" incident

for which he cannot be held liable I do not think any of his conduct could be characterized as being a reprisal against the Complainant for having instituted proceedings under the *Code*.

5. *Liability of Jim Hume*

The complaints herein raise only two specific instances of conduct on Mr. Hume's part, the averment in the second complaint that he had told Mr. Johnson that the Complainant's wife would get nowhere if he could help it being in my view evidence of *mala fides* colouring the other conduct, rather than a separate and independent infringement of the Complainant's rights. Thus, we are left with Mr. Hume's removal of the Complainant from the admitting and discharge area (paragraph 18 of the first complaint) and his deliberate mishandling of the "McKinnon made a mess" incident involving Mr. James (paragraphs 10 and 11 of the second complaint). It was submitted by the Commission and the Complainant that the first was an instance of direct discrimination and the second a reprisal, both being in contravention of the *Code*.

In *Ontario (Human Rights Comm.) and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, in dealing with the burden of proof in proceedings such as these, McIntyre J. referred to *O.H.R.C. v. Borough of Etobicoke*, [1982] 1 S.C.R. 202, and said (at p. 558) that:

It was held in that case that at least in direct discrimination cases, where the Complainant has shown a *prima facie* case of discrimination on a prohibited ground, the onus falls on the employer to justify if he can the discriminatory rule [or decision or act] on a balance of probabilities. ...

... Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. ... the Complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify the verdict in the Complainant's favour in the absence of an answer from the employer.

While there is no direct evidence of overt acts of racial discrimination against the Complainant on the part of Mr. Hume, rarely is such evidence to be found and it is well-established that an infringement of a right conferred by the *Code* may be based upon circumstantial evidence. (See, for instance, *Whitehead v. Servodyne Canada Ltd.* (1986), 8 C.H.R.R. D/3874; *Boehm (supra)*;

Hendry v. Liquor Control Board of Ontario (1980), 1 C.H.R.R. D/160; *McAra v. Motor Coach Industries Limited* (1988), 9 C.H.R.R. D/4858; *Hillicke v. Creative Financial Services Corp.* (1989), 10 C.H.R.R. D/5895; *Shaw v. Levac Supply Ltd. et al. (supra)*. The following statement made in *Toth v. Sassy Cuts Inc.* (1987), 8 C.H.R.R. D/4376 (at D/4377, para. 34285), indicates what is required in order to draw an inference of discrimination:

Other cases have described racial discrimination as being of an "insidious and concealed nature" and have indicated that often the matter is left to be decided on the basis of inference from what is, in effect, circumstantial evidence. Conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other explanation.

I have found that Mr. Hume deliberately treated the Complainant differently from others in respect of the error he made in the admitting and discharge area by unjustly removing him from that preferred location in order to accommodate Mr. Geswaldo's vindictiveness, and that he did so despite knowledge that the problem between these two officers was that the one was accused by the other of human rights violations, and it is contended on behalf of the Complainant that an inference of discrimination ought to be drawn from these circumstances. The conduct in question is "consistent with the allegation of discrimination" and, since no explanation – no "pretext" – whatsoever was offered for such clearly discriminatory behaviour, it seems to me that a finding that it was in contravention of the *Code* cannot be said to be "inconsistent with any other explanation". The decision to expel the Complainant from the area was so blatantly wrong that the absence of some other tenable explanation invites an inference of discrimination; see: *Bains v. Ontario Hydro* (1982), 3 C.H.R.R. D/1136, at D/1141. I accept that invitation.

After dealing rather exhaustively in the second part of these reasons with all of the circumstances involved in Mr. Hume's flagrant mismanagement of the Complainant's allegations regarding the unprofessional comment made by Mr. James about the "mess" he had made, and particularly having regard to the appalling questioning of the Complainant regarding his human rights complaint by one who was a named Respondent, I concluded that Mr. Hume had acted in retaliation against the Complainant for having filed that first complaint.

While the term "reprisal" is not defined in the *Code*, counsel for the Commission pointed out that the *Precise Oxford Dictionary of Current English* (1991 ed., Clarendon Press) defines "reprisal"

as "an act of retaliation", and defines "retaliation" as "to retaliate; to repay an injury, insult, etc. in kind; attack in return; make reprisals." Certainly, the meaning ascribed to "reprisal" for the purposes of the *Code* includes an act of retaliation against someone for having claimed or sought to enforce a right thereunder: see *Karumanchiri v. Ontario (Liquor Control Board)* (1987), 8 C.H.R.R. D/4076, and the Divisional Court decision dismissing the appeal, cited as *Ontario (Liquor Control Board) v. Ontario (Human Rights Commission)* (1988), 9 C.H.R.R. D/4868. For the above reasons I find that Mr. Hume infringed both the Complainant's right under s.5(1) of the *Code* to equal treatment without discrimination because of race, ancestry or ethnic origin, and his right under s.8 of the *Code* to claim and enforce without reprisal, or the threat thereof, his rights thereunder, and that the Ministry is jointly and severally liable with him for his having done so.

6. Liability of George Simpson

No specific allegations were made against Mr. Simpson in the first complaint in which he appears to have been named as a Respondent only because he was the Chief executive officer of the Centre when the various incidents described in that complaint occurred. However, as has been seen in considerable detail, as the Superintendent of the Centre at the time Mr. Simpson was implicated in the matter of the OM14 competition in relation to which, for reasons to which I will presently come, I do not think he can be found personally liable. As far as Mr. Simpson's failure to deal responsibly with the "blood cloth" episode is concerned, I see it as simply a managerial contribution to the poisoned workplace environment for which the Ministry alone is liable.

This leaves for consideration Mr. Simpson's unjustified disciplining of the Complainant over the "Fraser" incident by condemning him without just cause to a prolonged assignment on Floor 2B in what is regarded as a "punishment posting" by everyone connected with the Centre. There is no need to review the facts that make plain the harshness and unfairness of that decision. It was vindictive in the extreme and made all the worse because it was done by the person with ultimate local responsibility for the proper management of the institution and, as already indicated, it was done in retaliation against the Complainant for his having sought to enforce his rights under the *Code*. Thus, I find that Mr. Simpson infringed the Complainant's right under s.8 of the *Code* to

claim and enforce his rights thereunder with neither reprisal, nor the threat of reprisal, for which conduct he and the Ministry are jointly and severally liable.

7. Liability in respect of the OM14 Competition

Given its implications, the competition for the sergeant or OM14 positions was the most contentious aspect of the complaints before me and, in that regard, both counsel for the Commission and counsel for the Complainant referred to the *Karumanchiri* case (*supra*) which is similar to the present situation in a number of respects. In that case it was found that, as a result of a competition that had been set up to lead to the success of a particular caucasian candidate, the visible minority Complainant was first denied the appointment to the position of Assistant Chief Chemist at the LCBO and then, as a further consequence, subsequently denied the appointment to the position of Director of Laboratory Services when it became vacant. Having found that the Complainant, who was far more qualified than the successful but entirely innocent candidate, was denied these appointments because of racial discrimination, the Board ordered his appointment to the position of Director and that he be paid the difference in salary between what he had earned and what the successful candidate (who was thus required to vacate the Director's position) had earned since his appointment many years previously to the stepping stone position of Assistant Chief Chemist.

The finding of the Board in *Karumanchiri* that the competition was flawed was an inference drawn from a great many circumstances. Although, unlike the case before me, the Board in *Karumanchiri* had access to a complete file containing all the pertinent documentation, that the competition was skewed in favour of the successful candidate was not thereby self-evident. It required the careful analysis of a variety of information, including employee evaluations and accompanying narrative summaries over a period of many years, from all of which the inference was drawn that the competition was improperly conducted. Similarly, the finding of discrimination on a prohibited ground was not based on direct evidence, but was an inference drawn from the absence of any other reasonable explanation. It was said (at D/4097, para. 32323) that:

... In the absence of evidence to the contrary, the facts compel the conclusion of discriminatory motive contrary to the *Human Rights Code*.

While, owing to the irresponsibility of the Ministry, I have not had access to the full competition file, having regard to the evidence that was before me regarding that competition and to the conduct of Messrs Simpson and Hume in respect of other incidents as well, all of which has already been fully canvassed, it suffices to restate the inferences that I would draw on a balance of probabilities, namely, that the results of that competition were tampered with and that, there being no other credible explanation, it must have been done in order to deny the McKinnons promotions to that rank as a reprisal against the Complainant for his aggressive pursuit of various grievances, including his human rights complaints. However, unlike the Board in *Karumanchiri*, which was able to identify the persons responsible for the flawed character of that competition, I face a particular difficulty in that regard. While confident in my findings that the competition results were interfered with and that both Mr. Simpson and Mr. Hume harboured, and indeed expressed, the view that neither of the McKinnons would get anywhere in the institution as long as the Complainant pursued his human rights claims, the evidence does not point unequivocally at which of them was the person who carried out the tampering, or whether it was done by them (or at their behest) jointly.

Thus, while neither counsel for the Commission nor for the Complainant dealt with this evidentiary problem, I do not believe I can properly draw an inference as to the personal responsibility of either of these Respondents with respect to this specific matter. Nonetheless, it follows from my findings of fact that some employee who was part of the directing mind of the Ministry thereby contravened either s.5(1) or s.8 of the *Code* (or both) and, since the Ministry would be liable for such conduct regardless of which of its employees contravened the *Act*, in my view it cannot escape liability simply because the Commission and the Complainant are unable to identify that employee specifically. This seems to me analogous to *Interlake Tissue Mills Co. Ltd v. Salmon et al.*, [1948] O.R. 950, in which the Court of Appeal of Ontario applied the doctrine of *res ipsa loquitur* in holding an employer vicariously liable for the negligence of an unidentified employee. While the evidence did not point to the negligent culprit, the harm could not have occurred in the ordinary course of events without there having been negligence on the part of one of the employees and, since the employer would be vicariously liable regardless of which

of them it was, it was unnecessary to bring that negligence home to a specific employee in order to find that employer liable.

In conclusion, I find in these circumstances that the Complainant's s.5(1) right to equal treatment without discrimination because of race, ancestry or ethnic origin was infringed, as was his s.8 right to claim and enforce that right without actual or threatened reprisal, and that the Ministry is vicariously liable for the former and liable under the organic theory of corporate liability for the latter. That the scope of that liability extends to Ms Shaw-McKinnon's lost promotion is taken up in the next section.

PART IV - THE MATTER OF REMEDIES

1. General

Under s.41(1)(a) of the *Code* an order awarding damages for mental anguish cannot be made unless the party whose conduct is in question acted wilfully or recklessly. It has been repeatedly held that the meaning of "wilfully" in this provision is "intentionally", "knowingly" or "deliberately". (See, *inter alia*, *Cameron v. Nel-Gor Castle Nursing Home and Nelson*, (1984) 5 C.H.R.R. D/2170; *Underwood v. Board of Commissioners of Police of Smiths Falls* (1985), 7 C.H.R.R. D/3176, at D/3183; *Ghosh, supra*.) Since I find that each of the Respondents acted in full knowledge of the unwelcome character of their conduct, it follows that such conduct was "engaged in wilfully" and that it attracts such an award.

As to the quantum of general damages that ought to be awarded, counsel for the Commission said that "no specific amount is asked for [by the Commission], but it is submitted that it should be at the higher range". The position of counsel for the Complainant, however, was more definite in this regard, in support of which submissions he reviewed the impact upon the Complainant's health, family life and working relationships of his prolonged exposure to such abusive conduct.

There was medical evidence in the form of letters from the Complainant's physician in whose care he has been since 1990 (filed as Exhibit 112 and sealed by agreement of the parties) indicating that

the Complainant has been suffering from work-related stress and anxiety for which he is required to take medication. Both the Complainant and his wife spoke of the affect that these symptoms had on his appetite, his ability to sleep and his relationships with his family, and the Complainant testified as to the reluctance of co-workers to be seen to associate with him and as to the damage to his relationships with supervisory staff. It was pointed out that he has had to suffer through nine years of waiting for his complaints to be resolved "throughout which time he has continued to work at the Centre and to face daily the poisoned environment". Counsel for the Complainant ended this aspect of his submission as follows:

You have heard in this case about a great number of events, a great number of violations that Mr. McKinnon has been subjected to. I would urge you to make a series of mental anguish awards to recognize those. And I think in making such awards you should address your attention to the fact that Ms McKinnon was also subjected to reprisals. Now Ms McKinnon is not a Complainant here. I recognize that. But in making your assessment of the anguish that Mr. McKinnon has suffered you can and should, I submit, take into account the added distress, the added anguish, that was suffered because of the treatment of his spouse. I submit that in all the circumstances an award of \$20,000 for mental anguish for all of the events would be appropriate, taking into account the series of events from 1988 forward that Mr. McKinnon suffered, the length of time that they continued, the reprisals that he suffered and the ongoing circumstances of the workplace.

Although he did not specify the number of disparate orders he was seeking, or their quantum, counsel relied on the following passages from my decision in *Ghosh (supra)*, as authority for the making of such orders:

[116]... It remains necessary for [boards of inquiry] to assess general damages as objectively as possible having regard to the unique circumstances of the case at hand, and in such a way as to reflect not only the mental anguish that wilful or reckless conduct may cause, but elements of pain and suffering and injury to the Complainant's dignity and self-worth as well. In this respect several cases have had regard to the following factors: 1. The nature of the harassment, that is, was it simply verbal or was it physical as well? 2. The degree of aggressiveness and physical contact in the harassment. 3. The ongoing nature, that is, the time period of the harassment. 4. The frequency of the harassment. 5. The age of the victim. 6. The vulnerability of the victim. 7. The psychological impact of the harassment upon the victim. (See: *Torres v. Royalty Kitchenware Limited and Guercio* (1982), 3 C.H.R.R. D/858; *Cuff v. Gypsy Restaurant and Emile Abi-ad*, 8 C.H.R.R. D/3972; *Shaw, supra*.) And some regard has also been had to the awards of other boards of inquiry.

[118] While the *Code* limits the *amount* of an award of monetary compensation in respect of mental anguish, it does not restrict the *number* of such awards a Board may order after a hearing where it finds distinct rights to have been infringed in separate incidents, or series of incidents, and whether by the same or by different Respondents. In this case, Mr. Ghosh's right under s.4(2) of the *Code* to be free from harassment was separately infringed in contravention of s.8 by each of the Respondents, and his right under s.4(1) was infringed on three separate occasions involving two of the Respondents. Each Respondent, as a party found to have infringed a Part I right in contravention of s.8 of the *Code*, may be directed to make restitution, including an award for mental anguish of up to \$10,000, for each such infringement.

It seems clear to me that separate awards of general damages are required to be made with respect to each of the named Respondents, and that the infringements alleged and proved in the two complaints must be dealt with separately as well. While there is an inescapable element of arbitrariness in the determination of such awards, I have addressed this task as objectively as I can, bearing in mind both the general principle of true compensation and the criteria referred to in the above passage from *Ghosh*. It happens that, in the application of these considerations to the liability of each of these Respondents (for which, as already indicated, the Ministry is jointly and severally liable), the total amount of general damages that I would award corresponds with the amount suggested as reasonable by counsel for the Complainant.

Mr. Geswaldo's liability with respect to the first complaint is for harassment, and no single incident can be removed from the "course of conduct" of which that infringement consists in order to attract separate liability. However, his liability with respect to the second complaint is in respect of three incidents that can be characterized as reprisals and are, as such, separate infringements of the *Code* and, in my view, should be dealt with accordingly for the purpose of awarding general damages. Having regard to the extent of his harassment and the gravity of each reprisal considered separately, and to the fact that, while Mr. Geswaldo's conduct contributed substantially to the totality of the harm suffered by the Complainant for which he should be truly compensated, it was not the sole cause of that harm, I have concluded that the following awards for general damages should be made against him: (a) \$3,500 in respect of the harassment; (b)

\$500 in respect of the first reprisal; (c) \$750 in respect of the second reprisal; (d) \$750 in respect of the third reprisal.

Mr James's liability with respect to the second complaint is for harassment involving three incidents and, applying the same considerations, I would assess general damages against him in the amount of \$2,000.

The liability incurred by Mr Hume with respect to the first complaint is for an infringement of s.5(1) of the *Code* and, having regard to the responsibilities and expectations of his office as well as to the other factors I have referred to, I would assess general damages against him in the amount of \$1,500. His liability for the act of reprisal charged in the second complaint was exacerbated by his use of his power and position to interrogate the Complainant regarding the complaint in which he was a Respondent, and I would assess general damages against him in the amount of \$2,500 in respect of that infringement of s.8 of the *Code*.

Although there is only one incident for which Mr. Simpson can be found liable, it is the most egregious. He abused his power as the administrative head of the institution in order to punish the Complainant for having pursued his human rights complaint against him, and he did so by a public humiliation that was endured for nearly four months with serious effects upon the Complainant's morale and health, including the necessity of increased dosages of medication, and I would redress that infringement of the Complainant's s.8 right with an award of general damages in the amount of \$6,000.00.

Finally, if the conduct imposing as a condition of employment the "poisoned workplace environment" that infringed the Complainant's right under s.5(1) had consisted simply of the misdeeds of the other Respondents then, since the Ministry is jointly and severally liable therefor, I would be unprepared to award additional general damages under this head. However, the evidence shows that other managers and staff for whose conduct the Ministry is vicariously liable contributed by their acts and omissions to that atmosphere, thereby adding to the overall harm for

which the Complainant is to be compensated. In my view, the Ministry's responsibility for these added stressful circumstances ought to attract an award of general damages which I would assess at \$2,500.00.

2. Special Damages and Related Matters

It was the common submission of the Commission and the Complainant that he should be compensated for pay losses occasioned by leave taken because of work-related stress as indicated in the medical evidence (Exhibit 112), there being a significant drop in remuneration while on sick leave beyond an initial period of grace. Counsel for the Commission simply proposed that the necessary calculations "be reviewed by counsel for Complainant and Respondents" and that, if necessary, the matter be referred back to me. While the submission of counsel for the Complainant that "he should be made whole for sick days taken from the date of his complaint to the date of your award" is of easier application, I find it inappropriate. In my view, the Complainant is entitled to be compensated for such losses, but only in respect of absences clearly attributable to the stress caused by the wrongful circumstances and, since I shall remain seized of these complaints pending the final resolution of other matters as well, if counsel cannot agree in that regard they may refer the matter to me. Since such records may be used for a variety of administrative purposes, I would add that the Complainant's attendance record is to be adjusted accordingly in all Ministry files in which it may appear and any decisions based on the unadjusted record reviewed.

At the time of the competition the OM14 rank carried the title of "sergeant". It has since been upgraded to an OM16 level to which all former OM14's were automatically promoted, and they are frequently referred to as "lieutenants", and the principal remedy sought by counsel for the Commission in respect of the Ministry's liability regarding that competition is an order "promoting Michael McKinnon to the position of lieutenant when an opening becomes available". In the submission of counsel for the Complainant, however, the promotion of the Complainant ought not to be made conditional on the availability of an opening, and Ms Shaw-McKinnon ought to be dealt with similarly since she was wrongly deprived of the promotion as an act of reprisal

against the Complainant. Both the Commission and the Complainant seek a number of related orders as well.

It was contended that I have authority to make such orders pursuant to s.41(1)(a) of the *Code* which, by virtue of s.47(2) would override the provisions and regulations of any other *Act* not expressly made paramount. There does not appear to be anything in the *Public Service Act* or the *Ministry of Correctional Services Act* of this province, or the regulations thereto, having that effect. Counsel also referred in this connection to the *Uzoaba* and *Karumanchiri* cases (*supra*). In the course of its decision dismissing the appeal in *Karumanchiri*, the Divisional Court (Rosenberg J.) confirmed the jurisdiction of the Board to order both the appointment of the Complainant and the retroactive pay increases referred to earlier. After setting out the text of s.40(1) of the *Code* (s. 41(1) of the present *Code*), the court expressed its view on the jurisdictional issue as follows (at D/4874):

The provisions of the *Code* should be accorded a broad and liberal interpretation in order to, as far as possible, remedy the effects of or prevent discrimination. ...

It would, in my view, be contrary to the purposes of the *Code* to hold that Baum in order to "achieve compliance with the Act did not have the jurisdiction to place Karumanchiri in the position that he should have been placed in many years before." The words of the section are broad enough in providing that he may "direct the party to do anything" to allow him to direct the L.C.B.O. to replace Parker with Karumanchiri.

Counsel for the Respondents did not argue that I lack the jurisdiction to make similar orders regarding the Complainant should the Ministry be found liable in respect of the competition and, given my assessment of the facts, I am of the view that such relief should be ordered in this case. However, it was his submission that it is beyond my authority to make such orders regarding Ms Shaw-McKinnon who was not a Complainant in these proceedings. According to him the Complainant wanted:

... to open the back door and let Mrs. McKinnon into this as far as the remedy is concerned because it has had an impact on her. With respect, there may have been an impact on Mrs. McKinnon, as there may have been on any wife, if in fact her husband is under stress and brings that home [with him]. But to, in effect, give Mrs. McKinnon the relief that she would have been entitled to had she brought her own complaint, with respect, I submit to you is not within your jurisdiction.

The Complainant's position, however, is not that an order promoting Ms Shaw-McKinnon should be made in order to redress the "impact *on her*" of the wrongs she has suffered, but rather to fully redress the impact *upon the Complainant* of the wrongs done to him, which wrongs include the ill-use of his wife as a means of effecting the purpose of a reprisal against him. As counsel for the Complainant said in reply:

... if you find that there was a reprisal against Mr. McKinnon which included actions against his spouse, the idea being to put pressure on Mr. McKinnon or to penalize Mr. McKinnon, then I submit to you that you need to issue a remedy which overturns that aspect of the reprisal. It's an unusual case, the spouses working together, relatively unusual; but if you find that to be part of the reprisal, I submit to you that section 41(1)(a) of the *Code* gives you the power to do whatever needs to be done to remedy the breach. The fact that Ms McKinnon is not a Complainant doesn't matter because we say it was directed at Mr. McKinnon. If you find a breach and don't undo it, then the perpetrators have accomplished their task.

It seems to me that logic and justice support that submission and that, having found that the Complainant's rights under Part I have been infringed in the context of this competition through acts of reprisal aimed at him both directly (the denial of his own promotion) and indirectly (the denial of that of his wife), the proper remedy is to order the promotion of them both, the authority to do which I am satisfied is provided by s. 41(1)(a) of the *Code*. And such an order need not be made conditional on the arrival of vacancies; indeed, in *Karumanchiri* the order of the Board required that the innocent incumbent of the position be removed and replaced by the Complainant.

However, the remedies sought by the Commission and by the Complainant in respect of the competition do not stop with the matter of the promotions themselves; they seek as well a number of ancillary orders. It is submitted that the Complainant is entitled to the difference in pay between what he actually received and what he would have received had the promotion been made at the appropriate time, including overtime worked at a lesser rate than would have been the case, together with appropriately calculated interest thereon up to the time of this award, and that the same principle applies regarding Ms Shaw-McKinnon. Again, given the facts as I have found them, in my opinion the making of such orders in the present case would seem to be an inevitable consequence of the decision in *Karumanchiri*.

At this juncture, I would note that it is my intention to accept counsel's suggestion offered in anticipation of the making of such orders that I remain seized of the matter pending the endeavour of the parties to work out the amounts in question, failing which they should return to me for assistance.

It was also submitted by counsel for the Complainant that any orders made regarding promotion and back pay should be qualified in certain respects. He suggested that, while "the Complainant is hopeful and optimistic that with this Board's findings and remedies the environment at the Metro East will change", in light of all the evidence he has a legitimate concern about actually being moved into the position of OM16 and thus beyond the protection of the union and the collective agreement. Consequently, counsel proposes that:

... in all the circumstances what should be done is that Mr. McKinnon should be given the option as to whether or not he actually wishes to move into the position of lieutenant or simply to receive the pay for that position. And I submit to you that that option should remain open for Mr. and Ms McKinnon for a period of two years after the date of your award to give them the opportunity to assess whether in fact the environment has changed and [there has been] a good faith effort on the part of management and the Ministry to change, and whether they feel they can confidently and safely, from a job-security perspective, actually assume the duties of the position of OM16.

The governing principle being *restitutio in integrum*, my concern is to place the Complainant in the position he would have been in had the wrongs not occurred and to compensate him for his actual pecuniary losses. This submission seems to me inconsistent with that principle, and it is not one in which I am prepared to acquiesce. One of the bases upon which these orders rest is that, having earned these promotions, the McKinnons have been and remain capable of performing the duties in question. Indeed, there was evidence that the Complainant had acquitted himself extremely well in an acting assignment at that rank during the course of the very difficulties with which he has had to cope. I would be loathe to order that the McKinnons be paid prospectively for the discharge of responsibilities they are in fact unwilling to assume on account of an environment in which they would have to work anyway. To suggest that they require the continued protection of the union for a period of two years, or until personally satisfied with that environment, whichever comes first, strikes me as unreasonable, particularly given the various

other orders the Commission and the Complainant are also seeking. While I readily accept in principle the making of an order for retroactive pay for a level of work and responsibility that was not carried out only because of the wrongful denial of the opportunity to do so, I fail to see in the circumstances of this case any compelling reason why, after that opportunity presents itself, they should be allowed to postpone its acceptance, and perhaps ultimately to turn it down, and yet be paid for work and responsibilities they choose to leave undone and unassumed.

It was submitted by counsel for the Commission that, pursuant to my authority to direct any party to do anything that in my opinion it ought to do "in respect of future practices" to achieve compliance with the *Code*, I should make an order that would "prevent McKinnon from being required to be subject to the supervision of, or have to work with, either James or Geswaldo" in any future setting. To that end the Commission is seeking "an order requiring that Mr. Geswaldo be re-assigned from the Centre", no similar order being requested in respect of Mr. James since "his evidence had been that he was no longer working at the Centre". The purpose of such an order would be to preclude the Complainant from having to work with, or under the direction of, either of these Respondents as might otherwise result from any reorganization of the Ministry or the relocation of its personnel.

The submissions of counsel for the Complainant in this regard were quite drastic. He asked that I "order them removed from their positions in the public service of Ontario". After briefly touching upon the highlights of their misconduct, he suggested that the nature of the defence they mounted (the feigning of ignorance as to the racist character of their conduct and the making of false accusations against the Complainant to divert blame) demonstrates:

... that neither of those individuals have understood even at this late date the responsibilities on them as managers in the public service. There's been no remorse, no contrition, no indication that they understand in any way the effect of their actions on Mr. McKinnon, or even that their actions were inappropriate.

Even if I had the jurisdiction under s.41(1) of the *Code* to order the dismissal of an employee in an appropriate case, it seems to me clear that this is not such a case. What is being sought is not the regulation of future practices to assure conformity with the *Code*, but the punishment of these particular Respondents to an extent that is draconian and smacks of vindictiveness. The

Complainant was the subject of racial name-calling by many others besides these two Respondents, and the workplace environment was poisoned by the acts and omissions of many others as well. Mr. James's involvement was far less than that of Mr. Geswaldo who has not been an active source of difficulty for the Complainant since 1990. They have been found liable and ordered to pay damages for their conduct, all of which has already been taken into account for that purpose, and to affect them further by depriving them of their livelihood simply for the nature of their failed defence would in my view be punitive. However, I accept as appropriate and necessary the Commission's submission regarding these Respondents and shall make an order accordingly.

In yet another submission in which the Commission did not join, counsel for the Complainant asked that, "in recognition of the stress and distress suffered by Mr. and Ms McKinnon, and in recognition of the poisoned work environment in which they have operated", an order be made placing them on paid leave of absence for a period of six months, a period he said was meant to coincide with the completion of the human rights training programme that I have also been requested to order (see below). Counsel said that this would permit the McKinnons:

... to be away from the workplace until that training is completed and they can have some satisfaction that they will be returning to a workplace free from discrimination and harassment, a non-poisoned work environment so that the stress and distress they have suffered will not continue [to affect them].

The Complainant's mental anguish is redressed by the orders I am making for the payment of general damages, and a half-year's paid leave of absence in further "recognition of the stress and distress suffered" by him would be an additional award for the same harm and, incidentally, it would be greatly in excess of the \$10,000 maximum that is allowed for such relief. And, of course, no such award can be made for Ms Shaw-McKinnon who is not a party to these proceedings. Nor am I of the view that the Complainant, much less his wife, require sheltering from the environment of the Centre until the completion of a proposed training programme. The evidence that has convinced me that the workplace environment continues to be "poisoned" is to a very considerable extent the similar fact evidence of its impact on others who would not be similarly sheltered from what I expect would be its diminishing adverse impact upon everyone who works in it during what I trust will be an effective and relatively short transition period. The

purpose of such a training programme is not to benefit the Complainant personally, but to assist the corporate Respondent to rehabilitate the environment for the benefit of everyone. I am confident that the various orders I am making will ensure that neither the Complainant nor his wife is harassed or discriminated against during that transition period. However, if his real concern is the possible resentment of colleagues, that is something he must put up with in any case, and he cannot expect to go away on a lengthy paid leave of absence accompanied by his similarly paid wife while he hopes for it to subside.

Having regard to some of the evidence adduced in these proceedings, the Commission expressed concern over the contents of the Complainant's personnel file in terms of material relating to discrimination or harassment that ought to be removed from it, and an order to examine the file and remove such material was requested. Counsel said that, not having looked at the Complainant's file, the Commission was not in a position to comment upon the material it contained, but he submitted that "where the parties are unable to agree as to the proper disposition of any documents in his file [this Board] should remain seized of the matter so that it may render a decision as to what is appropriate". The record must be put right, and the requisite order will be made.

3. Other Remedies Sought

In addition to an order declaring that the Complainant's rights have been violated by these Respondents, the Commission and the Complainant requested the making of two particular orders pursuant to s.41(1)(a) in respect of future practices to ensure compliance with the *Code*, the first being in relation to the publication of that declaratory order and the second in relation to the establishment of a human rights training programme at the Ministry's expense.

In order to ensure the adequacy of publication they ask that within thirty days of the making of this award an appropriate document be read at parade and posted in conspicuous places in the Centre for a period of five consecutive days, that a copy of it be mailed with pay cheques to employees of the Centre and that, since many people who had worked there as the events in question unfolded have been relocated within the Ministry, a copy be published in the institutional bi-monthly staff newsletter, *Correctional Update*. I find such an order to be called for in the

circumstances. It was submitted that the sporadic training undertaken in the Centre from time to time has proved inadequate and that, according to the decision in *Dhillon (supra, at D/763)*, a Board of Inquiry under the *Code* has authority to order the Respondent Ministry to provide Commission-approved training to its staff regarding human rights with specific reference to racism and harassment in the workplace. It was submitted that, "because of the scope and the duration of discrimination in the workplace" the Ministry should be required, at its cost and within a period of six months, "to take reasonable steps to prevent further continuation or repetition of the infringement of the *Code*". It was said that "thorough staff training is required to remedy the problem at the Centre, and the Ministry should be required to take further steps to educate its staff in order to provide positive measures of reinforcement towards the inmates in order to discourage discriminatory conduct". This, too, is an order that I feel ought to be made in this case.

V. - ORDERS

Having for all the above reasons found the Respondents to be in breach of s.9 of the *Human Rights Code*, R.S.O. 1990, c. H.19, and liable for having infringed the Complainant's rights under s.5(1) and (2) and s.8 of the *Code* in the manner and to the extent described, it is hereby ordered as follows:

1. That the Respondents Frank Geswaldo and Her Majesty the Queen in the right of Ontario, Ministry of Correctional Services (the Ministry) pay the Complainant, Michael McKinnon, jointly and severally, the sum of \$5,500 as general damages for various acts of harassment and reprisal.
2. That the Respondents Phil James and the Ministry pay the Complainant, jointly and severally, the sum of \$2,000 as general damages for various acts of harassment.
3. That the Respondents Jim Hume and the Ministry pay the Complainant, jointly and severally, the sum of \$4,000 as general damages for acts of discrimination and reprisal.

4. That the Respondents George Simpson and the Ministry pay the Complainant, jointly and severally, the sum of \$6,000 as general damages for an act of reprisal.
5. That the Respondent Ministry pay the Complainant the sum of \$2,500 as general damages for discrimination through having permitted a "poisoned environment" as a condition of employment.
6. That the Respondent Ministry compensate the Complainant for the difference between his salary and the actual remuneration received by him while on "sick leave" owing to work-related stress from the time of his first complaint to the date of this award, together with appropriate pre-award interest thereon, such sums to be calculated by counsel or referred to me if they are unable to agree.
7. That within thirty days of the making of this order the Respondent Ministry promote both the Complainant, Michael McKinnon, and his wife, Vicki Shaw-McKinnon, to the rank of OM16, subject to his or her acceptance thereof, as the case may be.
8. That the Respondent Ministry pay to the Complainant and to Vicki Shaw-McKinnon the differences in remuneration between what they actually received and what they would have earned had they been promoted to the rank of OM14 following the competition held in March of 1989, and subsequently to the rank of OM16 at the date other staff of rank OM14 were automatically reclassified, together with appropriate pre-award interest thereon, such sums to be calculated by counsel or referred to me if they are unable to agree.
9. That the Respondent Ministry relocate the Respondent Frank Geswaldo, and that it ensure that neither he nor the Respondent Phil James work in the same institutional facility as the Complainant at any future time.
10. That the Ministry: (a) amend its records to correspond with part 6 of this order so as to ensure that the Complainant's absences from the work place caused by work-related stress since the date of the first complaint are not reflected in those records and are not used in respect of any decisions that might affect him; and (b) provide access to the Complainant's and his wife's personnel file by the Ontario Human Rights Commission in order that it satisfy itself that certain materials relating to the various human rights complaints are removed and destroyed.

11. That within thirty days of the making of this award the Respondent Ministry cause this series of orders (or such other text as counsel may agree upon) to be read at parade for five consecutive days, and that it attach a copy thereof to the pay slips of Metro East Toronto Detention Centre personnel and publish it in the institutional newsletter *Correctional Update*, or such other publication as may be appropriate.
12. That the Respondent Ministry establish at its own expense a human rights training programme that meets with the approval of the Ontario Human Rights Commission, which may be called upon for assistance in that regard, such programme to be conducted within six months of the date of this award.

I shall remain seized of this matter until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of any aspect of them, including questions concerning the amounts of monies to be paid and the removal of materials from the Complainant's and his wife's personnel files.

Dated this 28th day of April, 1998.



H.A. Hubbard
Board of Inquiry

